(13)

No. 91-781-CFX
Status: GRANTED

Docketed:
November 12, 1991

Title: United States, Petitioner
v.
A Parcel of Land, Buildings, Appurtenances and Improvements, Known as 92 Buena Vista Avenue, Rumson, New Jersey, et al.

Court: United States Court of Appeals for the Third Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Plaisted,James A.

Nov. 11 was HOLIDAY

Entry	Date	Note	Proceedings and Orders
1	Nov 12 1991	G	Petition for writ of certiorari filed.
2	Dec 18 1991		DISTRIBUTED. January 10, 1992
3	Jan 6 1992	P	Response requested -- BRW. (Due February 6, 1992)
4	Feb 6 1992		Brief of respondent Beth Ann Goodwin in opposition filed.
5	Feb 12 1992		REDISTRIBUTED. February 28, 1992
6	Mar 2 1992		Petition GRANTED.
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8	Apr 13 1992		Order extending time to file brief of petitioner on the merits until May 7, 1992.
9	May 7 1992		Joint appendix filed.
10	May 7 1992		Brief of petitioner United States filed.
12	Jun 1 1992		Order extending time to file brief of respondent on the merits until June 24, 1992.
14	Jun 4 1992		Record filed.
		*	Partial proceedings U. S. Court of Appeals, Third Circuit.
13	Jun 5 1992		Brief amici curiae of American Land Title Association, et al. filed.
15	Jun 9 1992		Record filed.
		*	Original proceedings U. S. District court, District of New Jersey.
16	Jun 15 1992		Brief amicus curiae of Federal Home Loan Mortgage Corp. filed.
20	Jun 16 1992	D	Motion of Federal Home Loan Mortgage Corporation for leave to participate in oral argument as amicus curiae, for divided argument and for additional time for oral argument filed.
17	Jun 18 1992		Order further extending time to file brief of respondent on the merits until July 8, 1992.
18	Jun 24 1992		Brief amicus curiae of Dade County Tax Collector, et al. filed.
19	Jun 26 1992		Brief amicus curiae of American Bankers Association filed.
21	Jul 8 1992		Brief of respondent A Parcel of Land, etc. filed.
22	Jul 10 1992		CIRCULATED.
23	Jul 21 1992		SET FOR ARGUMENT TUESDAY, OCTOBER 13,1992. (2ND CASE).
25	Aug 10 1992	X	Reply brief of petitioner filed.
26	Sep 4 1992		Motion of Federal Home Loan Mortgage Corporation for leave to participate in oral argument as amicus curiae,

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No. 91-781-CFX

Entry	Date	Note	Proceedings and Orders
			for divided argument and for additional time for oral argument DENIED.
27	Oct 1 1992	X	Supplemental brief of respondent filed.
28	Oct 13 1992		ARGUED.

No. 91-781

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

A PARCEL OF LAND, BUILDINGS, APPURTENANCES AND IMPROVEMENTS KNOWN AS 92 BUENA VISTA AVENUE, RUMSON, NEW JERSEY, AND BETH ANN GOODWIN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Whether a person who receives a gift of money derived from drug trafficking and uses that money to purchase real property is entitled to assert an "innocent owner" defense in an action seeking civil forfeiture of the real property.

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OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-16a) is reported at 937 F.2d 98. The opinions of the district court denying respondent Goodwin's motion for summary judgment (App., *infra*, 17a-35a) and certifying certain questions for interlocutory appeal (App., *infra*, 38a-45a) are reported, respectively, at 738 F. Supp. 854 and 742 F. Supp. 189.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 1991. A petition for rehearing was denied on August 13, 1991 (App., *infra*, 46a-47a). The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 511 of the Controlled Substances Act of 1970, 21 U.S.C. 881, is set forth in an appendix (App., *infra*, 48a-57a).

STATEMENT

In 1982, respondent Beth Ann Goodwin purchased a house in New Jersey. Joseph Brenna, with whom she shared the house, provided more than $200,000 of the purchase price. In this action, the government has shown probable cause to believe that Brenna obtained those funds from illegal drug transactions, and it is seeking civil forfeiture of the house under 21 U.S.C. 881(a)(6). Goodwin claims that the funds were a gift to her from Brenna and that she was unaware that the money was derived from drug dealing. The court of appeals held that those contentions, if proven, would support an "innocent owner" defense to forfeiture. The government's position is that the United States acquired title to the money used to buy the house when Brenna committed the offenses giving rise to the forfeiture and, consequently, that Goodwin never became an owner of the money or the house.

1. Under 21 U.S.C. 881, assets that have been used in or derived from drug trafficking are subject to forfeiture. In particular, Section 881(a)(6) provides:

> The following shall be subject to forfeiture to the United States and no property right shall exist in them: * * *

> (6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of [21 U.S.C. 801-904], all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

The defense recognized by the proviso in Section 881(a)(6) has come to be known as the "innocent owner" defense.

In accordance with the "relation-back" doctrine that has long been embodied in federal forfeiture statutes, see *United States* v. *Stowell*, 133 U.S. 1, 16-17 (1890), the United States acquires title to property that is forfeited under Section 881(a)(6) as of the time of the act triggering the forfeiture. Under 21 U.S.C. 881(h), "[a]ll right, title, and interest in property described in" Section 881(a) "vest[s] in the United States upon commission of the act giving rise to forfeiture * * *." This case presents the question whether a person who obtains an interest in drug proceeds only after the act triggering a forfeiture is eligible for Section 881(a)(6)'s innocent owner defense.

2. A forfeiture mandated by Section 881 is enforced by means of an *in rem* action against the assets in question. In 1989, the government commenced this suit against the property at 92 Buena Vista Ave-

nue in Rumson, New Jersey. Respondent Goodwin is the titleholder of record to the property, which consists of a house and its lot. The complaint alleges that the property was purchased with more than $200,000 provided by Joseph Brenna; that those funds were proceeds traceable to illegal drug transactions; and, consequently, that the property is subject to forfeiture under 21 U.S.C. 881(a)(6). The district court determined that the complaint was supported by probable cause and issued a warrant authorizing the seizure of the property. Goodwin continues to occupy in the house under an occupancy/tenant agreement with the Marshals Service. C.A. App. 54a-55a, 656a-663a.

Goodwin answered the complaint and asserted a claim to the property. In motions to dismiss the action and for summary judgment, she argued, among other things, that (1) the seizure was illegal because there was no probable cause to believe that the property was purchased with funds derived from drug transactions and (2) she was an innocent owner of the property within the meaning of Section 881(a)(6). In support of her innocent owner defense, Goodwin asserted that she lived with Brenna from approximately 1981 through 1987 in "an intimate personal relationship" and that Brenna supported her and her children until the two separated in 1987. Goodwin also claimed that the funds used to purchase the house were a gift from Brenna and that she was the sole owner of the property. She denied having any knowledge that the money was derived from illegal drug transactions. C.A. App. 568a-570a.

a. The district court denied Goodwin's motions. The court first found "that the government has demonstrated that probable cause exists to believe that

the premises are traceable to drug transactions." App., *infra*, 21a. The court relied on the fact that a federal grand jury in the Southern District of Florida has indicted Brenna for drug offenses occurring during the period from 1982 to 1988 and has charged that the property at issue here and some $24,000,000 in cash are proceeds of those violations.[1] The probable cause supporting that indictment, the district court indicated, would also support seizure of the property. The court also noted that a DEA agent had verified the allegations of the forfeiture complaint, that an informant had advised the government that the house was purchased with drug proceeds, and that neither Brenna nor Goodwin had filed income tax returns from 1978 through 1985. *Id.* at 21a-23a.

With respect to the funds used to purchase the house, the district court cited deposition testimony by Shaun Murphy, a British Virgin Islands accountant. By his own account, Murphy has specialized in making investments in a manner calculated to shield his clients' identities. To that end, Murphy gave his clients code names and established corporations, with nominees as shareholders and directors, to serve as investment vehicles. It was Murphy's practice not to make inquiries regarding the source of his clients'

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[1] C.A. App. 19a-20a. The Florida indictment, which was returned in April 1990, charges Brenna with two counts of violating the CCE statute (21 U.S.C. 848); one count of conspiring to import in excess of 1,000 kilograms of marijuana (21 U.S.C. 963); and four counts of importing in excess of 1,000 kilograms of marijuana (21 U.S.C. 952(a)). C.A. App. 39a-48a. Because he is a fugitive, Brenna has not been brought to trial on this indictment.

funds. He often picked up money in St. Thomas, in the U.S. Virgin Islands, and carried it to the British Virgin Islands, thereby violating currency reporting requirements. Murphy also shredded all "wastepaper" reflecting his transactions on a daily basis. Brenna was introduced to Murphy in 1982. Brenna (whom Murphy knew as Joseph Crawford or Joseph Cavanaugh) was assigned the code name "Joseph Smith" and the phrase "Mohave is warm this time of year" to identify himself over the telephone. In August and October 1982, Brenna made two deliveries of cash, totalling $470,000, to Murphy. In accordance with Brenna's instructions, Murphy wired $216,000 of that amount to a law firm in New Jersey. Those funds were used to purchase the property whose forfeiture is sought in this case. App., *infra*, 23a-24a; see C.A. App. 77a-88a, 98a-100a, 167a-173a.

Those circumstances and others, the district court concluded, "provide sufficient basis for probable cause to believe that the premises were purchased with proceeds traceable to drug transactions." App., *infra*, 24a.

b. The district court also rejected Goodwin's innocent owner defense. Noting that Goodwin had characterized the funds used to buy the house as a gift, the court held that "where, as here, the government has demonstrated probable cause to believe that property is traceable to proceeds from drug transactions, the innocent owner defense may only be invoked by those who can demonstrate that they are bona fide *purchasers for value*." App., *infra*, 27a. The court relied upon the language of the statute, the analogous criminal forfeiture statute, principles of property law, and common sense. *Id.* at 28a-29a. It defies belief, the court declared, "that

Congress intended for the innocent owner exception to permit a drug dealer to avoid the impact of the forfeiture statute by disbursing the proceeds from his drug transactions to 'innocent' friends, family or other random recipients of the trafficker's benevolence." *Id.* at 29a.

Goodwin moved for leave to pursue an interlocutory appeal under 28 U.S.C. 1292(b). The district court certified four questions for appeal, one of which was (App., *infra*, 45a):

> Whether an innocent owner defense may be asserted by a person who is not a bona fide purchaser for value concerning a parcel of land where the government has established probable cause to believe that the parcel of land was purchased with monies traceable to drug proceeds[.]

3. The court of appeals answered that question in the affirmative, holding that "Goodwin need not be a bona fide purchaser for value to raise an innocent owner defense pursuant to section 881(a)(6)." App., *infra*, 8a. The court reasoned that "the plain language of the innocent owner provision speaks only in terms of an 'owner' and in no way limits the term 'owner' to a bona fide purchaser for value." *Id.* at 7a. The court found additional support for that interpretation in the statute's legislative history. "Limiting the term 'owner' to a bona fide purchaser for value and thereby excluding a recipient of a gift from being considered an 'owner'," the court said, "would contravene the express legislative intent that we interpret 'owner' broadly." *Ibid.* The court also attributed significance to the fact that the statute providing for criminal forfeitures in drug cases, 21 U.S.C. 853(c), includes an exception for property transferred to bona fide purchasers. The absence of

a similar provision in Section 881, the court concluded, indicated that "Congress intended to omit the bona fide purchaser for value requirement in that section." App., *infra*, 8a.

The court acknowledged (App., *infra*, 8a) that the government's position—"that Goodwin could never have been an 'owner' because at the time of the drug transactions, all right, title, and interest in the proceeds from the drug transactions vested in the United States" under 21 U.S.C. 881(h)—was consistent with the Fourth Circuit's en banc decision in *In re One 1985 Nissan, 300ZX* [*Nissan*], 889 F.2d 1317 (1989). But the court ruled that Section 881(h) does not apply to property encompassed by the innocent owner defense. App., *infra*, 9a. In addition, the court suggested that the government's position "would essentially serve to emasculate the innocent owner defense," since "[n]o one obtaining property after the occurrence of the drug transaction—including a bona fide purchaser for value—would be eligible to offer an innocent owner defense on his behalf." *Ibid.*

The government petitioned for rehearing en banc. The court denied the petition over the dissents of four of its members. App., *infra*, 46a-47a.

REASONS FOR GRANTING THE PETITION

For nearly two centuries, this Court has interpreted forfeiture statutes to vest title to the assets in question in the United States at the time of the act giving rise to the forfeiture. The court of appeals' decision in this case creates a square conflict among the circuits as to the extent to which that "relation-back" doctrine governs forfeitures under 21 U.S.C. 881. In essence, the Third Circuit has held that the recipient of a gift of drug proceeds—which are subject to forfeiture at the time they are involved in an illegal transaction—may nonetheless qualify as an innocent owner of those assets. By contrast, the Fourth and Tenth Circuits have held that a person asserting an interest in drug proceeds acquired after title is vested in the United States is simply not an owner, innocent or otherwise. *Nissan*, 889 F.2d at 1321; *Eggleston* v. *Colorado*, 873 F.2d 242, 245-248 (10th Cir. 1989), cert. denied, 493 U.S. 1070 (1990). The language of Section 881 supports the latter interpretation, and none of the other considerations invoked by the Third Circuit justifies a different conclusion.

Congress has placed special emphasis on forfeitures as a means of combatting illegal drug trafficking. Unless overturned, the Third Circuit's decision will undercut the efficacy of the remedy that strikes most directly at the economic dimension of the drug trade.

1. Laws providing for forfeitures of property involved in criminal activity were among the earliest statutes enacted by Congress. See *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 683 (1974). From the outset, it has been "the settled doctrine" of this Court that

> whenever a statute enacts that upon the commission of a certain act specific property used in or

> connected with that act shall be forfeited, the forfeiture takes effect immediately upon the commission of the act; the right to the property then vests in the United States, although their title is not perfected until judicial condemnation; the forfeiture constitutes a statutory transfer of the right to the United States at the time the offense is committed; and the condemnation, when obtained, relates back to that time, and avoids all intermediate sales and alienations, even to purchasers in good faith.

United States v. *Stowell*, 133 U.S. at 16-17.[2]

This Court has applied that interpretation to a wide variety of forfeiture statutes. For instance, in *United States* v. *1960 Bags of Coffee*, 12 U.S. (8 Cranch) 398 (1814), the Court rejected a contention by bona fide purchasers of coffee that a forfeiture under the Non-Intercourse Act of 1809 took effect only when the property in question was seized and condemned. "[T]he commission of the offence," this Court held, "marks the point in time on which the statutory transfer of right takes place." *Id.* at 405. The Court has adhered to that understanding of statutory forfeitures on many occasions.[3] Re-

[2] Ironically, the entity that accountant Murphy created to conceal Brenna's assets was named "Stowell Investments, Limited." C.A. App. 168a-169a.

[3] See, *e.g.*, *The Brigantine Mars*, 12 U.S. (8 Cranch) 417 (1814); *Gelston* v. *Hoyt*, 16 U.S. (3 Wheat.) 246, 311 (1818); *Henderson's Distilled Spirits*, 81 U.S. (14 Wall.) 44, 56-58 (1872); *Thacher's Distilled Sipirits*, 103 U.S. 679, 682 (1881). See also *Caldwell* v. *United States*, 49 U.S. (8 How.) 366, 381 (1850) (distinguishing between statutes that provide for forfeiture upon the doing of an act, in which case title relates back to the time of the act, and statutes that allow an election as to what property will be forfeited, in which case the forfeiture occurs at the time of the election); *United States* v. *Grundy & Thornburgh*, 7 U.S. (3 Cranch) 337, 352-354 (1806) (same); *Ivers* v. *United States*, 581 F.2d 1362, 1367 (9th Cir. 1978); *Simons* v. *United States*, 541 F.2d 1351, 1352 (9th Cir. 1976); *Florida Dealers & Growers Bank* v. *United States*, 279 F.2d 673, 676, 677 (5th Cir. 1960); *Weathersbee* v. *United States*, 263 F.2d 324, 327 (4th Cir. 1958); *United States* v. *Pacific Finance Corp.*, 110 F.2d 732, 733 (2d Cir. 1940); *The Rethalulew*, 51 F.2d 646, 648 (9th Cir. 1931).

cently, in *Caplin & Drysdale* v. *United States*, 491 U.S. 617, 627 (1989), the Court noted that the criminal drug forfeiture statute, 21 U.S.C. 853(c), "reflects the application of the long-recognized and lawful practice of vesting title to any forfeitable assets, in the United States, at the time of the criminal act giving rise to forfeiture."

Like the statutes at issue in *Stowell*, *1960 Bags of Coffee*, and *Caplin & Drysdale*, Section 881(a)(6) specifies that drug proceeds shall be subject to forfeiture upon the commission of specified criminal activity. Consequently, the United States acquires title to forfeited drug proceeds at the time of the illegal transactions giving rise to those proceeds. Indeed, a 1984 amendment to the statute codifies the relation-back doctrine. Section 881(h) provides that "[a]ll right, title, and interest in property described in [Section 881(a)] shall vest in the United States upon commission of the act giving rise to forfeiture * * *."[4]

[4] Although Section 881(a)(6) had been in effect for six years before Section 881(h) was added to the civil drug forfeiture statute, Congress understood that the relation-back principle codified in Section 881(h) was already "well established" in the law. S. Rep. No. 225, 98th Cong., 2d Sess. 215 (1984).

2. In this case, the Third Circuit held that the relation-back doctrine does not preclude an individual from acquiring an interest in drug proceeds, for purposes of the innocent owner provision of Section 881(a)(6), after the point at which the property has become subject to forfeiture. The Fourth and the Tenth Circuits have reached the opposite conclusion.

In *Nissan*, *supra*, the government sought civil forfeiture of more than $1,000,000 in cash and other drug proceeds found at the residence of a deceased drug dealer. The executor of the drug dealer's estate argued that the deceased's heirs were "innocent owners" within the meaning of 21 U.S.C. 881(a)(6) because they had acquired their interest in the deceased's property without being aware of his illegal activities. The Fourth Circuit rejected that contention. The court explained that under the relation-back doctrine (889 F.2d at 1321):

> White [the deceased drug dealer] could not have given good title to anyone while living, including his children. So White's death certainly does not permit any greater property interest to pass than White would have been able to pass if living. Neither White's personal representative nor his children had any claim to any interest in White's property prior to the acts of White which gave rise to forfeiture, and for that reason the innocent owner provision of the statute provides no relief for them.

Similarly, in *Eggleston* v. *Colorado*, 873 F.2d at 245-248, the Tenth Circuit held that the State of Colorado was not an innocent owner of drug proceeds by virtue of sales tax liens that arose only after the offenses triggering the forfeiture of that property.

The court explained that "[t]he innocent owner exception applies only to owners whose interest vests prior to the date of the illegal act that forms the basis for the forfeiture," and that title to the drug proceeds in question "vested in the United States through forfeiture prior to any ownership interest held by the State." *Id.* at 248.

Three other courts of appeals have stated—albeit without specific reference to the innocent owner defense—that the relation-back doctrine precludes third parties from acquiring enforceable interests in drug proceeds after the events subjecting the proceeds to forfeiture.[5] Numerous district court decisions have

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[5] *United States* v. *Trotter*, 912 F.2d 964, 966 n.2 (8th Cir. 1990) (en banc) ("Since title vests 'in the United States' [at the time of the forfeiture], other creditors, including state agencies, may not claim any part of the funds if the government successfully obtains forfeiture."); *United States* v. *$5,644,540.00 in U.S. Currency*, 799 F.2d 1357, 1364-1365 (9th Cir. 1986) (rejecting claims of finders of drug proceeds and State on the ground that "[a]ll right, title, and interest in the property vested in the government upon the act giving rise to forfeiture"); *United States* v. *One Single Family Residence*, 894 F.2d 1511, 1520 n.10 (11th Cir. 1990) (if a drug trafficker made a sale of drugs and used the proceeds to purchase a piece of real estate, the purchase would not give rise to a protected interest in favor of a spouse, since "[t]he trafficker ceased to hold title to the money before the property was purchased and could not divest the government by a subsequent exchange"); *United States* v. *Four Parcels of Real Property*, 879 F.2d 586, 590 n.11, 593-594 (11th Cir. 1989) ("all legal and equitable interests that arise subsequent to the proscribed activity which gave rise to the forfeiture are subordinated to that of the United States, despite that the holders of such interests had no actual notice that the property was subject to forfeiture"); *United States* v. *$41,305.00 in Currency & Traveler's Checks*, 802 F.2d 1339, 1346 (11th Cir. 1986) (observing that judgment lien acquired after act giv-

reached conflicting conclusions on the applicability of the innocent owner defense to after-acquired interests in property involved in drug offenses.[6] In this case, four members of the Third Circuit would have granted rehearing en banc to consider the relationship between the relation-back doctrine and the innocent owner defense.

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ing rise to forfeiture did not give rise to enforceable interest in drug proceeds, since "[i]llegal use immediately vests title to the property in the sovereign, and cuts off the rights of third parties to obtain legally protectible interests in the property"). See also *United States* v. *1977 Porsche Carrera 911*, No. 90-8638 (5th Cir. Oct. 30, 1991) (government acquired title to automobile before claimant's title was perfected under state vehicle title statutes).

[6] Compare *United States* v. *All That Tract or Parcel of Land*, 762 F. Supp. 1479, 1484 (N.D. Ga. 1991) (claimants asserting interest in real property purchased with drug proceeds are not "owners" under 21 U.S.C. 881(a)(6)); *United States* v. *5854 North Kenmore*, 762 F. Supp. 204, 208 (N.D. Ill. 1991) (relation-back doctrine bars claim to drug proceeds acquired by wife after illegal acts occurred); *United States* v. *127 Shares of Stock in Paradigm Mfg.*, 758 F. Supp. 581, 584 (E.D. Cal. 1990) (since drug proceeds were forfeited before husband used them to purchase stock, wife acquired no interest in the stock); *United States* v. *One Parcel of Real Estate Property*, 660 F. Supp. 483, 487 (S.D. Miss.) ("Since the forfeiture actually occurs at the moment of the illegal use, no third party can acquire a legally cognizable interest in the property after the date of the illegal act which forms the basis of the forfeiture."), aff'd, 831 F.2d 566 (5th Cir. 1987), with *United States* v. *One Single Family Residence Located at 6960 Miraflores Ave.*, 731 F. Supp. 1563, 1569 (S.D. Fla. 1990) ("a bona fide purchaser is entitled to the protection of the innocent owner exception to * * * 21 U.S.C. § 881(a)(7)"); *United States* v. *One Single Family Residence*, 683 F. Supp. 783, 787 (S.D. Fla. 1988) ("the innocent owner exception to the forfeiture under section 881 also protects bona fide purchasers for value"). See also *United States* v. *Land, 4629-4631 S. Carrollton Ave.*, 766 F. Supp. 527, 529 (E.D. La. 1991); *In re Certain Real Property Located at Lot 8*, 763 F. Supp. 150, 151 (W.D.N.C. 1991); *United States* v. *One Parcel of Real Property*, 743 F. Supp. 103, 106 (D.R.I. 1990), appeal dismissed, 936 F.2d 632 (1st Cir. 1991).

Further review is warranted to resolve the square conflict among the circuits regarding the applicability of Section 881(a)(6)'s innocent owner defense to after-acquired interests in property involved in drug offenses.

3. In the Third Circuit's view, the "plain language" of the innocent owner provision compels the conclusion that a person may become an owner of drug proceeds by means of a gift that occurs only after the proceeds are subject to forfeiture. See App., *infra*, 8a. We disagree.

a. Even when read in isolation, Section 881(a)(6) cannot fairly be read to confer a defense on a person whose interest in drug proceeds arises only after the unlawful act triggering a forfeiture. That Section authorizes forfeiture of specified categories of property involved in or traceable to illegal drug transactions, but provides that "no property shall be forfeited * * * to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner." As the district court recognized (App., *infra*, 28a), the innocent owner exception looks to the state of mind of the person who is the owner of the property at the time when an illegal act or omission triggers the forfeiture of the property. If the act or omission giving rise to a forfeiture is "committed or omitted without the knowledge or consent of" the person who owns the

property, no forfeiture of that owner's interest occurs. If, on the other hand, the owner is aware of or consents to the illegal act, he forfeits his interest. At that point, under Section 881(a), the assets "shall be subject to forfeiture to the United States and no property right shall exist in them."

Section 881(a)(6) does not recognize the possibility that an owner who has lost all of his interest in drug-related property by reason of a forfeiture may reverse the forfeiture, and divest the United States of its "right, title, and interest" in the property, by means of a purported conveyance to a new "owner." The innocent owner defense—which turns on whether the actual drug offense was *committed* with the knowledge or consent of the owner of property involved in the offense—cannot meaningfully be applied to a person whose claim to ownership arises only after the commission of the offense is complete.[7] By its terms, the innocent owner defense focuses on the state of facts at the time of the act or omission giving rise to a forfeiture. The knowledge of the

[7] A variation on the facts of this case illustrates the point. Suppose that Brenna bought the house with drug proceeds before he even knew Goodwin; that Goodwin later met him, learned of his illegal drug business, and moved in with him; and that Brenna then gave Goodwin the house as a gift. On those facts, the house would be subject to forfeiture by virtue of acts and omissions occurring before Goodwin knew Brenna —and, if Goodwin qualifies as an "owner," those acts and omissions would seem to have been "committed or omitted without the knowledge or consent of that owner." The only way to avoid that obviously untenable result is to recognize, consistent with the relation-back doctrine, that a person claiming an after-acquired interest in drug proceeds is not an "owner" whose knowledge or consent is relevant to the forfeitures mandated by Section 881(a)(6).

owner at that point determines whether a forfeiture occurs. Such a forfeiture, once it takes effect, is final.

b. The relation-back provision, 21 U.S.C. 881(h), confirms that the forfeitures of drug proceeds prescribed by the statute occur at the point of the pertinent drug offense and are thereafter irreversible. Section 881(h) specifically provides that "[*a*]*ll right, title, and interest* in property described in [Section 881(a)] shall vest in the United States upon commission of the act giving rise to forfeiture * * *" (emphasis added). The title that the United States acquires under that provision is immediate, unqualified, and irrevocable. Section 881(h) leaves no room for the creation, by means of a later transfer, of an interest in drug proceeds that is superior to the title conferred on the government.

The Third Circuit attempted to circumvent the plain language of this provision by suggesting that an after-acquired interest in drug proceeds held by an innocent party is not "property described in" Section 881(a)(6). App., *infra*, 8a. That interpretation, although perhaps linguistically possible, cannot be reconciled with the substance of the relation-back provision. The sole purpose of Section 881(h)'s broad grant of title to the United States at the point when property is involved in an illegal drug transaction is to make clear that subsequent transfers to other persons do not pass good title. If it is to perform that function, the statute must contemplate that the property on which it operates will be identifiable at the point of the grant and that applicability of the statute (and the title it confers) will not be affected by later transfers.

Under the Third Circuit's interpretation of Section 881(a)(6), however, property on which Sec-

tion 881(h) has already operated can be pulled outside the statute retroactively by a transfer to an innocent third party. The upshot is that what is in plain statutory language an unqualified grant of "all right, title, and interest" to drug proceeds at the point of a drug offense is nullified, *nunc pro tunc*. Because the purpose of Section 881(h) is to defeat attempted transfers, the Third Circuit's interpretation effectively deprives that provision of its meaning. That interpretation does not represent a plausible accommodation of the innocent owner defense and the relation-back provision. Cf. *American Paper Institute* v. *American Electric Power Service Corp.*, 461 U.S. 402, 421 (1983) (statutes should not be construed so as to impute to Congress "a purpose to paralyze with one hand what it sought to promote with the other").[8]

c. The only reasonable reading of the innocent owner provision—in view of its own language, the

[8] In terms of this case, the government has established probable cause to believe that the money Brenna transferred to Goodwin was derived from drug dealing. If it was, that money was, at the point of Brenna's unlawful acts, "property described in" Section 881(a)(6), and the United States acquired "all right, title, and interest" to it. Under the Third Circuit's view, however, the very same property would cease to be "property described in" Section 881(a)(6) if it were transferred to someone without knowledge of Brenna's illegal activities, and the title previously conferred on the United States would be revoked. If the property were returned to Brenna at a later point, the Third Circuit would presumably hold that the property was again subject to the relation-back provision and that the government's title had been restored. A statute that on its face grants unqualified title to specified property at a given point in time cannot reasonably be construed to embody such an in-again, out-again conception of ownership.

relation-back provision, and this Court's decisions in *Stowell* and other similar cases—is that the term "owner" refers only to those persons who are owners of the property at the point when it becomes subject to forfeiture. So construed, the statute provides relief to an important class of property owners. If, for instance, property owned by a non-participant in a drug transaction is exchanged for drugs or otherwise used to facilitate the transaction, that owner may assert an innocent owner defense to avoid forfeiture. At the point when drug proceeds are forfeited, however, all title vests in the United States, and no subsequent conveyance by the drug dealer can make anyone else an "owner" of the property.

4. This case does not involve a bona fide purchaser of drug proceeds. Nevertheless, the court of appeals relied upon its concern for that category of transferees of drug proceeds to support its interpretation. In particular, the court attached significance to the fact that the criminal drug forfeiture statute, 21 U.S.C. 853(c), provides an express exception for bona fide purchasers, and it suggested that the government's interpretation, as applied to bona fide purchasers, would "emasculate" the innocent owner exception. App., *infra*, 7a, 9a. Neither consideration justifies a departure from the result mandated by the text of the statute.

a. Section 853, which provides for forfeitures of drug-related assets on the basis of criminal convictions, was enacted in 1984, six years after Section 881(a)(6) was added to the civil forfeiture statute. At the time, there was some uncertainty as to whether the relation-back doctrine, which originated in the civil context, would carry over to criminal forfeitures. The Senate Committee Report explained (S.

Rep. No. 225, 98th Cong., 2d Sess. 196 (1984) (emphasis added)):

> The problem of pre-conviction dispositions of property subject to criminal forfeiture is further complicated by the question of whether, simply by transferring an asset to a third party, a defendant may shield it from forfeiture. *In civil forfeitures, such transfers are voidable, for the property is considered "tainted" from the time of its prohibited use or acquisition.* But it is unclear whether, in the context of criminal forfeitures, the same principle is applicable so that improper pre-conviction transfers may be voided.

To resolve that uncertainty, the 1984 Congress included a relation-back provision in the criminal forfeiture statute, 21 U.S.C. 853(c), and it provided for forfeiture of all property in the hands of transferees, except for bona fide purchasers.[9] As noted, the same Congress also codified the relation-back doctrine with respect to civil forfeitures, while recognizing that the doctrine was already "well established in current law." S. Rep. No. 225, *supra*, at 215. Whether by oversight or design, however, the civil relation-back

[9] Section 853(c) provides:

> All right, title, and interest in property described in subsection (a) of this section vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (n) of this section that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

provision, 21 U.S.C. 881(h), included no exemption for bona fide purchasers.

The exception for bona fide purchasers in Section 853(c) does not suggest that the 1984 Congress—let alone the prior Congress that enacted the innocent owner provision at issue here—intended to exempt *all* innocent transferees of drug-related property from civil forfeitures, whether or not bona fide purchasers. To the contrary, the 1984 committee report expressed the view that all transfers of "tainted" property by drug offenders were "voidable" in civil forfeiture proceedings and indicates that Section 853(c) was intended to produce the same result in the criminal context, with a limited exception for bona fide purchasers. The fact that the 1984 Congress failed to provide a similar express exception in the civil context does not justify exempting all innocent transferees from civil forfeitures.[10]

[10] The upshot of the Third Circuit's reasoning is a very peculiar anomaly illustrated by the facts of this case. The federal indictment against Brenna charges him with drug-related offenses and alleges that the property in question here is subject to criminal forfeiture. If Brenna is convicted and that allegation is sustained, Goodwin will have no defense to such a forfeiture, because she is concededly not a bona fide purchaser. There is no reason to believe that the 1984 Congress intended to authorize criminal forfeitures of property that was exempt from civil forfeiture. (As we demonstrate below, the possibility that property that is exempt from criminal forfeiture by virtue of a transfer to a bona fide purchaser will be subjected to civil forfeiture is more hypothetical than real.)

The facts of this case also illustrate why it is so important that civil forfeitures be available even for property that is subject to criminal forfeiture. Brenna is a fugitive and, at present, cannot be tried. Likewise, if a criminal defendant dies, any prosecution against him abates, and civil proceedings

b. Moreover, the Third Circuit's concern for the effect of the government's position on bona fide purchasers is greatly overstated. The Attorney General has discretion to remit civil forfeitures of drug-related assets. 21 U.S.C. 881(d) (incorporating provisions of customs laws relating to "the remission or mitigation of * * * forfeitures"). Regulations providing for the exercise of that discretion make special provision for general creditors, lienholders, lessors, and other holders of bona fide interests in property that is subject to forfeiture. 28 C.F.R. 9.6. More generally, any person may petition for remission of a forfeiture on the strength of a showing that the petitioner "has a valid, good faith interest in the seized property as owner or otherwise" and that the owner was without knowledge of the property's involvement in a violation. See 28 C.F.R. 9.5. Finally, appropriations from the Assets Forfeiture Fund are available to compromise and pay valid liens and mortgages on forfeited property and to make payments to innocent persons in connection with the remission and mitigation of forfeitures. 28 U.S.C. 524(c)(1)(D) and (E); see S. Rep. No. 225, *supra*, at 217.

In keeping with the policy underlying those provisions, we are advised that federal law enforcement authorities do not, as a matter of practice, pursue forfeiture of property in the hands of bona fide purchasers for value. In any event, the Third Circuit's concern for bona fide purchasers cannot support an

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are the only remaining means of enforcing a forfeiture of drug proceeds belonging to the deceased offender. In some cases, civil forfeitures also enable the government to take control of drug-related assets without awaiting the completion of criminal proceedings.

exception for all after-acquired interests in drug-related property.[11]

5. Congress has made clear that forfeitures play an essential role in efforts to eradicate drug trafficking. The reasoning underlying the drug forfeiture legislation enacted in 1984 is no less compelling today (S. Rep. No. 225, *supra*, at 191):

> Today, few in the Congress or the law enforcement community fail to recognize that the traditional criminal sanctions of fine and imprisonment are inadequate to deter or punish the enormously profitable trade in dangerous drugs which, with its inevitable attendant violence, is plaguing the country. Clearly, if law enforcement efforts to combat racketeering and drug trafficking are to be successful, they must include

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[11] District court decisions have relied upon the legislative history of the 1978 and 1984 amendments to the civil forfeiture statute as a basis for recognition of a limited exception for bona fide purchasers. *United States* v. *One Single Family Residence Located at 6960 Miraflores Ave.*, 731 F. Supp. at 1568; *United States* v. *One Single Family Residence*, 683 F. Supp. at 787-788. See *Nissan*, 889 F.2d at 1322 (Murnaghan, J., concurring). To our knowledge, the Third Circuit's decision in this case is the first to apply the innocent owner defense to transferees other than bona fide purchasers whose claims have arisen after drug proceeds are subject to forfeiture.

It should also be noted that while forfeitures of property in the hands of bona fide purchasers are harsh, they are hardly unprecedented. See, *e.g.*, *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. at 680-690; *J.W. Goldsmith, Jr.-Grant Co.* v. *United States*, 254 U.S. 505, 510-511 (1921); *Thacher's Distilled Spirits*, 103 U.S. at 682; *Dobbins's Distillery* v. *United States*, 96 U.S. 395, 401 (1878); *Henderson's Distilled Spirits*, 81 U.S. (14 Wall.) at 56-57; *Harmony* v. *United States*, 43 U.S. (2 How.) 210, 233 (1844).

> an attack on the economic aspects of these crimes. Forfeiture is the mechanism through which such an attack may be made.

The Third Circuit's decision, unless reversed, will undercut the effectiveness of that critical remedy.

In its most benign applications, the Third Circuit's interpretation will enable drug dealers to realize a benefit from their illegal activities. Money has value to a drug dealer, like anyone else, in part because it can be given away. Even if courts could reliably limit the innocent owner defense to donees who were in fact ignorant of the source of their gifts, the Third Circuit's interpretation would allow drug dealers to distribute their wealth to minor children, other unknowing family members, associates, and others with whom they seek to curry favor. Following Brenna's lead, they could even enjoy the use of very valuable property that they have given to their most intimate companions.

Furthermore, the Third Circuit's interpretation will encourage drug dealers to use nominees to conceal their assets. It is not difficult for even close friends or relatives of a drug trafficker to contend, as Goodwin does here, that they were unknowing recipients of gifts of drug proceeds—and it is difficult to assemble evidence rebutting such a claim. By placing title to drug proceeds in another person, therefore, a drug trafficker can erect a serious obstacle in the way of the government's efforts to obtain forfeiture of assets that are demonstrably traceable to drug transactions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 1991

APPENDIX A

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

No. 90-5823

UNITED STATES OF AMERICA

v.

A PARCEL OF LAND, BUILDINGS, APPURTENANCES AND IMPROVEMENTS, KNOWN AS 92 BUENA VISTA AVENUE, RUMSON, NEW JERSEY, and BETH ANN GOODWIN, CLAIMANT

Argued April 2, 1991

Decided June 17, 1991

Rehearing Denied Aug. 13, 1991

Before MANSMANN and HUTCHINSON, Circuit Judges, and O'NEILL, District Judge.*

OPINION OF THE COURT

MANSMANN, Circuit Judge.

In this appeal arising out of a civil forfeiture action, at least nominally civil in nature, we are pre-

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* Honorable Thomas N. O'Neill, Jr. of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

sented with the very interesting question of whether the donee of monies, which the government has established probable cause to believe are traceable to drug transactions and which were used by the donee to purchase the premises that the government seeks to forfeit, may assert an innocent owner defense pursuant to 21 U.S.C. § 881(a)(6).[1] The district court found that the donee, Beth Ann Goodwin, could not assert such a defense because she admitted that the money with which she bought the premises was a gift and therefore she was not a bona fide purchaser for value. We conclude that the district court erred as a matter of law because Goodwin was entitled to assert an innocent owner defense even though she was not a bona fide purchaser for value. Additionally, we shall address three other questions that have been certified by the district court pursuant to 28 U.S.C. § 1292(b).

I.

Joseph Anthony Brenna and Beth Ann Goodwin shared a close personal relationship, akin to marriage, from the late 1970's until 1987. In early November of 1982, Brenna had approximately $216,000 transferred by wire to Goodwin's attorneys in New Jersey which Goodwin used to purchase the real property known as 92 Buena Vista Avenue, Rumson, New Jersey. Goodwin has held title to these premises and has resided there since 1982.

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[1] Section 881(a)(6) sets forth an innocent owner defense to "civil" forfeiture proceedings instituted under § 881. Section 853(c) also sets forth an innocent owner defense to criminal forfeitures under § 853, but in different language. As explained below, that difference can be significant. *See* Part III, at [6a], *infra*.

On April 3, 1989, the government filed a verified complaint pursuant to 21 U.S.C. § 881 *et seq.* seeking the seizure and forfeiture of the premises. The forfeiture proceeding was brought by the government as a consequence of the indictment of Joseph Anthony Brenna. The indictment alleged that from on or about January 1982, Brenna and others engaged in a continuing criminal enterprise in violation of 21 U.S.C. § 848, engaged in a conspiracy to import more than 1,000 kilograms of marijuana into the United States in violation of 21 U.S.C. § 963, and knowingly imported in excess of 1,000 kilograms of marijuana into the United States in violation of 21 U.S.C. § 952(a), and 18 U.S.C. § 2. On April 12, 1989, upon the *ex parte* application of the United States, the United States District Court for the District of New Jersey reviewed the verified complaint and determined that there was probable cause to believe that the premises were subject to forfeiture. The court thus issued a Summons and Warrant For Arrest and soon thereafter a United States Marshal seized the premises. Goodwin remains in possession of the premises pursuant to an Occupancy/Tenant Agreement with the United States Marshals Service.

On June 15, 1989, Goodwin filed an Answer, Claim and Counterclaim. On May 29, 1990, a hearing was held before the district court at which Goodwin moved to dismiss the complaint and seizure or, in the alternative, to grant summary judgment in her favor with respect to the United States' claim for forfeiture. The United States opposed the motion and crossmoved for a stay of the forfeiture proceedings. The district court denied Goodwin's motions and granted the United States' motion for a stay pending the criminal trial of Brenna and his co-defendants in the Southern

District of Florida. The district court further ordered that if Brenna's trial were severed from the remaining defendants because of his fugitive status, Goodwin could move for relief from the stay after the trial of the remaining defendants. On July 13, 1990, the district court issued an order pursuant to 28 U.S.C. §1292(b) certifying for appeal four questions:

> (1) Whether the seizure of the home of the claimant, Beth Ann Goodwin, was unconstitutional because there was no preseizure hearing and, if so, whether the forfeiture proceedings involving the home should be dismissed as a result;
>
> (2) Whether an innocent owner defense may be asserted by a person who is not a bona fide purchaser for value concerning a parcel of land where the government has established probable cause to believe that the parcel of land was purchased with monies traceable to drug proceeds;
>
> (3) Whether the verified complaint in this action was based, in part, upon immunized testimony and if so, whether the forfeiture proceedings must be dismissed as a result; and
>
> (4) Whether the United States' claims in this action are barred by the applicable statute of limitations and/or undue delay.

Because these certified questions involve questions of law, we shall exercise plenary review.

II.

Goodwin asserts that the government's seizure of her home pursuant to 21 U.S.C. § 881 *et seq.* without pre-seizure notice and hearing is in violation of the United States Constitution. In support of this argument, Goodwin cites *United States v. Property at 4492*

S. Livonia Road, Livonia, New York, 889 F.2d 1258 (2d Cir. 1989). In *South Livonia*, the Court of Appeals for the Second Circuit specifically considered whether 21 U.S.C. § 881(a)(7) was unconstitutionally applied in the context of the seizure of the claimant's home without notice and a hearing. Despite the fact that the court concluded that the claimant's interest in his home and the lack of exigent circumstance surrounding the seizure made the seizure unlawful, the court nevertheless determined that the forfeiture was not improper. Based on decisions from other courts of appeals, the Court of Appeals for the Second Circuit held that "the illegal seizure of property, standing alone, [does] not immunize that property from forfeiture, so long as impermissibly obtained evidence is not used in the forfeiture proceeding." *South Livonia*, 889 F.2d at 1265.

In keeping with the analysis used in *South Livonia*, we agree that the government's seizure of Goodwin's home pursuant to section 881 without notice and a hearing may have been unlawful. Nonetheless, the unlawfulness of the seizure does not require dismissal of the forfeiture proceedings provided that probable cause to seize the premises can be supported by untainted evidence. *United States v. One 1978 Mercedes Benz, Four-Door Sedan*, 711 F.2d 1297, 1302-03 (5th Cir.1983). Indeed, the indictment of Brenna, which establishes probable cause to believe that he was involved in a drug importation scheme, and other inferential evidence obtained independently of the illegal seizure suffice to establish that the district court had "reasonable grounds to believe that the property probably was derived from drug transactions." *United States v. Parcels of Land*, 903 F.2d 36, 39 (1st Cir. 1990). Accordingly, the district court correctly de-

clined to dismiss the forfeiture action, "because the government [did] establish[], by permissible evidence, that probable cause exist[ed] to subject the premises to forfeiture." *U.S. v. 92 Buena Vista Ave.*, 738 F.Supp. 854, 857 (D.N.J.1990).

III.

Goodwin also argues that the district court erred in holding that Goodwin could not invoke an "innocent owner" defense pursuant to section 881(a)(6) because she was not a bona fide purchaser for value. Section 881(a)(6) provides for an innocent owner defense in the following language:

> . . . . no property shall be forfeited . . . to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

21 U.S.C. § 881(a)(6). Goodwin admits that the money provided to her by Brenna to purchase the premises was a gift, but she asserts that she did not know that such money was the proceeds of drug transactions.

The district court articulated three specific bases in support of its conclusion that an innocent owner defense may only be invoked by a bona fide purchaser for value: (1) the criminal forfeiture statute, 21 U.S.C. § 853(c), explicitly protects only transferees who are bona fide purchasers for value; (2) those who do not have legal title to property may not validly transfer it to others except when the transferee is a bona fide purchaser for value; and (3) in the case of fraudulent conveyances, bona fide purchasers for value may be protected, but recipients of gifts are

not. The district court further noted that from a common sense standpoint it was unlikely that Congress intended that a drug dealer should be able to distribute, with impunity, the proceeds from his drug transactions, even to innocent parties.

Despite the appeal of this analysis, the plain language of the innocent owner provision speaks only in terms of an "owner" and in no way limits the term "owner" to a bona fide purchaser for value. Furthermore, in *United States v. Parcel of Real Property Known as 6109 Grubb Road*, 886 F.2d 618 (3d Cir. 1989), we determined, after reviewing the legislative history of section 881(a)(6), that "the term 'owner' should be broadly interpreted to include any person with a recognizable legal or equitable interest in the property seized." *Id.* at 625 n. 4 (quoting 1978 U.S. Code Cong. & Admin. News at 9522-23). Limiting the term "owner" to a bona fide purchaser for value and thereby excluding a recipient of a gift from being considered an "owner" would contravene the express legislative intent that we interpret "owner" broadly.

Moreover, as the district court pointed out, the criminal forfeiture statute, section 853, is explicitly limited to bona fide purchasers for value, while in section 881 Congress omitted such limiting language. We believe that such a difference was intended by Congress. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291, 108 S.Ct. 1811, 1817, 100 L.Ed.2d 313 (1988) ("if the statute is clear and unambiguous, that is the end of the matter, for the court . . . must give effect to the unambiguously expressed intent of Congress"). In section 881, Congress chose to utilize the broad term "owner." Therefore, rather than reading into section 881 a requirement that an owner be a bona fide purchaser for value, we conclude that

Congress intended to omit the bona fide purchaser for value requirement in that section. Consequently, we hold that Goodwin need not be a bona fide purchaser for value to raise an innocent owner defense pursuant to section 881(a)(6).

The government forcefully argues that Goodwin never acquired an ownership interest in the premises because of the relation back doctrine embodied in 21 U.S.C. § 881(h), which provides that "[a]ll right, title, and interest in property described in subsection (a) of this section shall vest in the United States upon commission of the act giving rise to forfeiture under this section." Thus, the government asserts that Goodwin could never have been an "owner" because at the time of the drug transactions, all right, title, and interest in the proceeds from the drug transactions vested in the United States. *See In the Case of One 1985 Nissan, 300 ZX*, 889 F.2d 1317 (4th Cir.1989).

We disagree with this analysis. Again we must read the plain language of the statute as Congress must have intended it by the words and structure it carefully chose. Section 881(h) vests title in the United States *in that property described in subsection (a)*. Subsection (a) sets forth that property which is subject to forfeiture and it also provides for "innocent owner" defenses.[2] Consequently, the property referred to in subsection (a) does *not* include property that has been exempted from forfeiture by means of an innocent owner defense. Logically then one must first ascertain whether the property at issue is not forfeitable because of an innocent owner defense before applying section 881(h). If the property is exempted from forfeiture pursuant to an innocent owner defense and therefore is not forfeitable property under subsection (a), then section 881(h) does not apply to such property that is not subject to forfeiture. Accordingly, the relation back doctrine would only be relevant in this case if a determination were made that Goodwin did not make out a valid innocent owner defense.

[2] Both sections 881(a)(6) and 881(a)(7) provide for the use of "innocent owner" defenses.

Moreover, to interpret section 881(h) in the manner suggested by the government would essentially serve to emasculate the innocent owner defense provided for in section 881(a)(6). No one obtaining property after the occurrence of the drug transaction—including a bona fide purchase for value—would be eligible to offer an innocent owner defense on his behalf. Judge Murnaghan, in his concurrence in *1985 Nissan*, gives an example which illustrates the overreaching effects that might result if the government's argument were accepted by us:

> If a drug dealer should buy a car from a perfectly reputable auto dealership with proceeds from drug sales, apparently, under the majority's opinion, the government could use civil forfeiture to take away the money paid to the car dealer, even though the dealer was entirely unaware that he had sold the automobile to a drug dealer.

1958 Nissan, 889 F.2d at 1322. Accordingly, we will remand this matter to the district court to determine whether Goodwin was an innocent owner.

IV.

In May, 1989, the United States immunized Goodwin and took her testimony concerning the criminal investigation of Brenna. In his deposition testimony, Special Agent Richard Giacobbe of the Drug Enforcement Administration, who verified the forfeiture complaint, admitted that Goodwin's immunized testimony was relied upon, in part, in preparing the complaint. Goodwin argues that the use of such testimony deprived her of her fifth amendment rights and therefore the complaint should be dismissed with prejudice.

The extent of immunity granted to Goodwin was set forth in a May 4, 1988, letter signed by Assistant United States Attorney Lynne W. Lamprecht. In the letter, the government agreed that pursuant to 18 U.S.C. § 6002 "no testimony or other information resulting from Ms. Goodwin's interview on May 5, 1988 (or any information directly or indirectly derived from such testimony or other information) may be used against Ms. Goodwin *in any criminal case* except a prosecution for perjury, or for giving a false statement." (Emphasis added.)[3] The district court

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[3] For the purposes of our analysis, we shall assume, without deciding, that a civil forfeiture effected under section 881 constitutes a "criminal case" under the immunity statute, 18 U.S.C. § 6002. Obviously, if we were to decide that a section 881 forfeiture is not a criminal case, no more analysis would be required and upon that basis we would be able to affirm the district court's conclusion that the use of Goodwin's immunized testimony does not require that the forfeiture complaint be dismissed.

We note that there is caselaw supporting the argument that such a forfeiture does constitute a criminal case. In *Boyd v.*

concluded from this language that Goodwin was granted use immunity for her testimony and not transactional immunity. Therefore, despite the fact that the complaint was based, in part, on immunized testimony, the district court ruled that because the government established probable cause from other independent sources, it would not dismiss the complaint.

The immunity granted pursuant to 18 U.S.C. § 6002 is, indeed, "use" immunity. *Tierney v. United*

United States, 116 U.S. 616, 634, 6 S.Ct. 524, 534, 29 L.Ed. 746 (1886), the Supreme Court stated:

> We are also clearly of opinion that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal. . . . The information, though technically a civil proceeding, is in substance and effect a criminal one. . . . As therefore, suits for penalties and forfeitures, incurred by the commission of offenses against the law, are of this quasi criminal nature, we think they are within the reason of criminal proceedings for all the purposes of the Fourth Amendment of the constitution and of that portion of the Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself.

Id.; see also One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 700, 85 S.Ct. 1246, 1250, 14 L.Ed.2d 170 (1965) (citing *Boyd* for the proposition that a forfeiture proceeding is quasi-criminal in character with the same objectives of a criminal proceeding: to penalize one for committing a crime); and *United States v. Riverbend Farms, Inc.*, 847 F.2d 553 (9th Cir.1988) (quoting *United States v. Seifuddin*, 820 F.2d 1074, 1077 (9th Cir.1987) for the proposition that forfeiture statutes are criminal "only for the purposes of the fourth amendment search and seizure clause and the fifth amendment self-incrimination clause").

States, 409 U.S. 1232, 93 S.Ct. 17, 34 L.Ed.2d 37 (1972). In *United States v. Pellon*, 475 F.Supp. 467, 479 (S.D.N.Y.1979), the court distinguished "use" immunity from "transactional" immunity:

> The difference between transactional immunity and use immunity is that in the former, the witness is protected completely from prosecution for any offense about which he testifies. Use immunity is not as broad; it precludes only the Government's use of the testimony, and the witness may still be prosecuted if the prosecution can prove its case independently of the witness' own testimony.

Id. (citing *Kastigar v. United States*, 406 U.S. 441, 449-53, 92 S.Ct. 1653, 1658-61, 32 L.Ed.2d 212 (1972)).

The district court concluded that the United States "adequately demonstrated, from other sources independent of Ms. Goodwin's testimony, that probable cause exists to support forfeiture of the premises." *92 Buena Vista*, 738 F.Supp. at 861. In support of its determination that there was an independent basis for a finding of probable cause, the district court set forth the following facts, among others, that were derived independently of Goodwin's testimony:

> On or about April 13, 1990, a Grand Jury sitting in the Southern District of Florida returned an indictment against Joseph A. Brenna, among others, for violations of 21 U.S.C. §§ 848 and 853 and for forfeiture of the property in question. . . . The probable cause to indict Mr. Brenna for the drug offenses was derived independent of any information from the claimant, since the

> claimant disclaims any knowledge of Mr. Brenna's involvement in drug transactions. . . . In addition, Mr. Giacobbe obtained information from a Mr. Joseph Mazacco, an individual cooperating with the government on a plea agreement, that Brenna used drug money to purchase the premises . . . .
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> * * * * *
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> In addition, Ms. Goodwin states *in her verified petition* that she lived with Joseph Brenna from approximately 1981 through 1987; that she maintained an intimate personal relationship with him during that time; and that he supported her and her children . . . . She further states that Mr. Brenna made a gift to her of the proceeds used to purchase the premises . . . .
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> * * * * *
>
> The government has also received testimony from Mr. Shaun Murphy, an accountant working out of the British Virgin Islands, who made investments on behalf of clients so that their real names would not be revealed . . . .
>
> * * * * *
>
> As for his [Mr. Murphy's] business with Mr. Brenna, between August and October, 1982, Mr. Brenna brought two cash deposits to Mr. Murphy in the amount of $250,000.00 and $220,000.00, the latter deposit being given to him in a bag . . . . Mr. Brenna instructed Mr. Murphy to wire $216,000.00 of this cash to Mason, Griffin and Pierson, a law firm in New Jersey, . . . for purchase of the premises . . . . Mr. Murphy also wired about $89,000 up to New Jersey. . . . Mr. Brenna did not explain from where he got his

> cash and, as was his general business practice, Mr. Murphy made no inquiries . . . .

92 Buena Vista, 738 F.Supp. at 857-58 (emphasis added).

In determining whether proceeds are traceable to drug transactions, "[t]here is no need to tie the [property] to proceeds of a *particular identifiable* illicit drug transaction." *United States v. 1982 Yukon Delta Houseboat*, 774 F.2d 1432, 1435 n.4 (9th Cir.1985) (emphasis in original). In determining whether probable cause exists for forfeiture, "all that is required is that a court be able to look at the 'aggregate' of the facts and find reasonable grounds to believe that the property probably was derived from drug transactions." *United States v. Parcels of Land*, 903 F.2d 36 (1st Cir.1990). Based upon the information cited by the district court which was garnered independently of Goodwin's testimony, the district court correctly concluded that probable cause existed for the forfeiture of the property pursuant to 21 U.S.C. § 881(a)(6).

V.

Finally, we must address the issue of whether the United States' claims are barred by the applicable statute of limitations or undue delay. It appears clear that the customs laws are intended to provide the relevant statute of limitations with respect to forfeiture proceedings brought pursuant to section 881. Section 881(d) provides:

> The provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs laws; the disposition of such property or the proceeds from the sale thereof; the remission or mitigation of such forfeitures; and the compromise of claims shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under any of the provisions of this subchapter, insofar as applicable and not inconsistent with the provisions hereof; . . . .

21 U.S.C. § 881(d). Furthermore, the legislative history provides that "Subsection (d) of this section provides that forfeiture proceedings shall be in accord with the provisions of existing U.S. customs law." House Report No. 91-1444, Comprehensive Drug Abuse Prevention and Control Act of 1970, reprinted in 1970 *U.S.Code Cong. and Adm.News*, pp. 4566, 4624.

The applicable statute of limitations, 19 U.S.C. § 1621 of the customs laws, requires that the United States commence its forfeiture action against Goodwin "within five years after the time when the alleged offense was discovered." 19 U.S.C. § 1621. Accordingly, because the government became aware of the transactions giving rise to this action in 1986 and because the government instituted this forfeiture action within five years (1989), the statute of limitations does not bar this action.

Goodwin also claims that the forfeiture action is barred by undue delay. The only caselaw which we have been able to uncover involves undue delay between the time of the seizure of the property and the post-seizure filing of the forfeiture action. Consequently, because this forfeiture proceeding was brought prior to the seizure, such caselaw is inapposite. Here, Goodwin has been permitted to be heard "at a meaningful time after the deprivation of the property . . . ." *92 Buena Vista*, 738 F.Supp. at

862. Moreover, Goodwin has not been wholly deprived of her property since she has been permitted to continue to reside at the premises in accordance with the terms of the occupancy agreement. Therefore, the district court correctly held that there was no undue delay that would warrant dismissal of this forfeiture proceeding.

VI.

Accordingly we will remand this case to the district court to reconsider Goodwin's motion for summary judgment and her motion to dismiss after determining whether Goodwin was an "innocent owner." We will, however, affirm the district court with respect to the other certified issues.

APPENDIX B

UNITED STATES DISTRICT COURT
D. NEW JERSEY

Civ. A. No. 89-1411

UNITED STATES OF AMERICA, PLAINTIFF

v.

A PARCEL OF LAND, BUILDINGS, APPURTENANCES, AND IMPROVEMENTS, KNOWN AS 92 BUENA VISTA AVE., RUMSON, NEW JERSEY, DEFENDANT

June 1, 1990

OPINION

HAROLD A. ACKERMAN, District Judge.

The United States of America brings this action for the civil forfeiture of real property pursuant to 21 U.S.C. §881. The property in question is a Parcel of Land, Buildings, Appurtenances and Improvements, known as 92 Buena Vista Avenue, Rumson, New Jersey (hereinafter the "premises"). The action was commenced by the filing of a Verified Complaint in April, 1989, which was immediately followed by a seizure of the premises. On June 15, 1989, Ms. Beth Ann Goodwin filed an Answer and Claim against the property.

Presently before the Court is a motion by the claimant, Ms. Goodwin, to dismiss the complaint, for summary judgment, and to compel discovery. Her motion for dismissal of the complaint is based upon the grounds that (1) the seizure of her home was unconstitutional, because there was no probable cause and no preseizure hearing; (2) the property is not subject to forfeiture, because Ms. Goodwin is an "innocent owner"; (3) the Verified Complaint was based, at least in part, on immunized testimony; (4) the government unduly delayed in the seizure and/or is barred by the statute of limitations; and (5) the government's refusal to engage in discovery justifies dismissal of this action. The government has opposed the claimant's motion on all grounds and has cross-moved for a stay on discovery and/or a stay of this action. I shall first address the arguments raised by the claimant, because a finding that this action should be dismissed would obviate the need to consider the government's motion for a stay. On the other hand, a finding that the government is entitled to a stay may only postpone (and not obviate) the need to consider the claimant's arguments in support of her motion, and I think the fairest approach is to consider claimant's arguments first.

I. *Constitutionality of the Seizure*

The premises in question were seized after the complaint, verified by Special Agent Richard Giacobbe of the Drug Enforcement Administration, ("DEA"), was reviewed by this Court and a finding was made that probable cause existed for the seizure. The claimant asserts that the "seizure should be dissolved," because it was effected in violation of the United States Constitution since there was no probable cause for the

seizure and no preseizure hearing. The parties have pointed out that there is no binding precedent to guide this Court on the issue of whether preseizure notice and a hearing are constitutionally required before a home is seized under 21 U.S.C. § 881, and further, that the Second and Eleventh Circuits have split on the issue. *See United States v. Property at 4492 S. Livonia Road, Livonia, New York*, 889 F.2d 1258, 1265 (2d Cir.1989), *reh'g denied*, 897 F.2d 659 (2d Cir.1990) (preseizure notice and hearing required), and *United States v. A Single Family Residence and Real Property Located at 900 Rio Vista Blvd., Ft. Lauderdale, Fl.*, 803 F.2d 625, 632 (11th Cir.1986) (no preseizure notice or hearing required).

However, there is no need for me to address this constitutional issue. "Various circuit courts have held that the illegal seizure of property, standing alone, will not immunize that property from forfeiture, so long as impermissibly obtained evidence is not used in the forfeiture proceeding." *Real Property Located at 4492 S. Livonia Rd., supra*, at 1265 (citations omitted); *see also Application of Kingsley*, 802 F.2d 571, 578-579 & n. 9 (1st Cir.1986). Where an unconstitutional seizure occurs, the victim can bring a damages action against the offending officer "should he be able to show that the warrantless seizure was effected in bad faith and caused personal damage", *United States v. One 1978 Mercedes Benz, Four-Door Sedan*, 711 F.2d 1297, 1303 n. 7 (5th Cir.1983), but it provides no basis for dismissing an action where the government demonstrates entitlement to forfeiture based upon permissible evidence. *See id.* at 1303; *see also United States v. One 1975 Pontiac Le mans, Etc.*, 621 F.2d 444, 450-51 (1st Cir.1980) (same). I find that the instant complaint should not

be dismissed, because the government has established, by permissible evidence, that probable cause exists to subject the premises to forfeiture.

Pursuant to the forfeiture statute at hand, all proceeds traceable to drug transactions are subject to forfeiture. 21 U.S.C. § 881(a)(6). In determining whether proceeds are so traceable, "[t]here is no need to tie the [property] to proceeds of a *particular identifiable* illicit drug transaction." *United States v. 1982 Yukon Delta Houseboat*, 774 F.2d 1432, 1435 & n. 4 (9th Cir.1985) (emphasis in original). In addition, the government is only required to demonstrate that probable cause exists for property to be subject to forfeiture under 21 U.S.C. § 881. *United States v. Property Known as 6109 Grubb Road*, 886 F.2d 618, 521 (3d Cir.1989), *reh'g denied*, 890 F.2d 659, (3d Cir.1989). The burden then shifts to the claimant to show, by a preponderance of the evidence, that the property is not forfeitable. *See* 19 U.S.C. § 1615. *See also United States v. $55,518.05 in U.S. Currency*, 728 F.2d 192, 195-6 (3d Cir.1983); *United States v. One 56-Foot Yacht Named Tahuna*, 702 F.2d 1276, 1281 (9th Cir.1983).

In assessing whether the government has sustained its burden of showing probable cause, inadmissible hearsay may be considered. *United States v. Miscellaneous Jewelry*, 667 F.Supp. 232, 238 (D.Md.1987), *aff'd*, 889 F.2d 1317 (4th Cir.1989); *United States v. Yacht Named Tahuna*, *supra*, at 1283. In addition, probable cause merely requires that the available facts would "warrant a man of reasonable caution in the belief" that the property is subject to forfeiture; "it does not demand any showing that such a belief be correct or more likely true or false." *Texas v. Brown*,

460 U.S. 730, 742, 103 S.Ct. 1535, 1543, 75 L.Ed.2d 502 (1983) (Rehnquist, J., plurality) (citations omitted); *see also United States v. Rickus*, 737 F.2d 360, 367 (3d Cir.1984) ("[p]robable cause deals with probabilities, not certainties"). In making a probable cause determination, the totality of the circumstances are considered. *See Rickus*, *supra*, at 367. "[A]ll that is required is that a court be able to look at the 'aggregate' of the facts and find reasonable grounds to believe that the property probably was derived from drug transactions." *United States v. Parcels of Land*, 903 F.2d 36 (1st Cir.1990).

I find that the government has demonstrated that probable cause exists to believe that the premises are traceable to drug transactions. On or about April 13, 1990, a Grand Jury sitting in the Southern District of Florida returned an indictment against Joseph A. Brenna, among others, for violations of 21 U.S.C. §§ 848 and 853 and for forfeiture of the property in question. *See* Affidavit of Neil R. Gallagher, Esq., filed May 4, 1990, ("Gallagher Aff. II"), and Exhibit A. The probable cause to indict Mr. Brenna for the drug offenses was derived independent of any information from the claimant, since the claimant disclaims any knowledge of Mr. Brenna's involvement in drug transactions. *See infra*, Section II. In addition, apart from the indictment, probable cause is established. In the Verified Complaint, DEA Agent Giacobbe attests that, to his knowledge, the following facts, among others, are true: (1) that the premises in question were purchased by Ms. Goodwin with funds provided by Joseph A. Brenna; (2) that Mr. Brenna had been involved in a scheme to import marijuana into the United States from Columbia during the years 1982 through 1986; (3) that Mr. Brenna

obtained $216,000.00 for the purchase of the premises from criminal acts involving importation, possession and distribution of controlled dangerous substances; (4) that on September 29, 1988, Mr. Brenna pled guilty to violating 31 U.S.C. § 5322 and 18 U.S.C. § 2 for failure to file a currency report for the transfer of $225,000, part of which was used to purchase the premises; and (5) that in December, 1986, Mr. Brenna paid $30,000.00 to a crew member smuggling marijuana in the premises. *See* Verified Complaint, ¶¶ 5-19. In addition, Mr. Giacobbe obtained information from a Mr. Joseph Mazacco, an individual cooperating with the government on a plea agreement, that Brenna used drug money to purchase the premises. *See* deposition of Mr. Giacobbe, taken June 27, 1989, at 75, 78-79, 143, (annexed as Exhibit A to Affidavit of James A. Plaisted, filed Sept. 1, 1989), [Plaisted Aff."]).

In addition, Ms. Goodwin states in her verified petition that she lived with Joseph Brenna from approximately 1981 through 1987; that she maintained an intimate personal relationship with him during that time; and that he supported her and her children. *See* Verified Petition of Beth A. Goodwin, May 19, 1989, ("Goodwin Pet."), ¶ 1, annexed to Plaisted Aff. as Exhibit C. She further states that Mr. Brenna made a gift to her of the proceeds used to purchase the premises. *Id.*, ¶¶ 3, 8. As attested to by Agent Giacobbe in his deposition, an Internal Revenue Service Investigation revealed that Ms. Goodwin had no visible means of support from 1980 through at least 1985. *See* Giacobbe dep. at 85; *see also* Verified Complaint, ¶ 9. Neither she nor Mr. Brenna filed income tax returns for the years 1978 through 1985. *See* Certificates of Non-Record, annexed as Exhibits A

and B to Neil R. Gallagher Aff., filed Oct. 5, 1989, ("Gallagher Aff. I"). Ms. Goodwin explains her failure to file tax returns by stating that she has not been shown to have had any income other than that obtained from Mr. Brenna. *See* Claimant's Reply Brief at 9.

The government has also received testimony from Mr. Shaun Murphy, an accountant working out of the British Virgin Islands, who made investments on behalf of clients so that their real names would not be revealed. *See* deposition of Shaun Murphy, August 2, 1989, ("Murphy dep."), annexed to Gallagher Aff. I as Exhibit E, at 7, 11. In making investments for his clients, Mr. Murphy used code names. He thought Mr. Brenna's real name was either Joseph Crawford or Joseph Cavanaugh with his pseudonym being Joseph Smith. *Id.* at 7, 10, 11. Mr. Murphy had a large number of clients; he had approximately five hundred companies and managed funds or investments for about two hundred of those companies. *Id.* at 4-5. It was his business practice *not* to inquire of his clients as to the source of their funds, although many of his clients had given him funds in excess of one million dollars. *Id.* at 6, 16. It appears that he had a practice of picking up money in St. Thomas and taking it to Tortola in the British Virgin Islands. *Id.* at 11. He also had a practice of shredding all "wastepaper" from his transactions on a daily basis. *Id.* at 27.

As for his business with Mr. Brenna, between August and October, 1982, Mr. Brenna brought two cash deposits to Mr. Murphy in the amount of $250,000.00 and $220,000.00, the latter deposit being given to him in a bag. *See* Murphy dep. at p. 95, 98-9. Mr. Brenna instructed Mr. Murphy to wire $216,000.00 of this cash to Mason, Griffin and Pier-

son, a law firm in New Jersey, (Murphy dep., at 100), for purchase of the premises. *See* Claimant's Reply Brief at 1, 8. Mr. Murphy also wired about $89,000 up to New Jersey. *Id.* at 102. Mr. Brenna did not explain from where he got his cash and, as was his general business practice, Mr. Murphy made no inquiries. Murphy dep. at 6-7. "[A] large amount of cash 'is strong evidence that the money was furnished or intended to be furnished in exchange for drugs.'" *United States v. U.S. Currency $88,310,78*, 851 F.2d 1231, 1236 (9th Cir.1988); *see also*, for example, *United States v. $55,518.05 in United States Currency*, *supra*, at 196 ("Golden's silence speaks ever so loudly. For most Americans, $55,518 is not casual pocket change which one leaves on the bureau at night").

In sum, (in addition to the indictment which itself establishes probable cause), DEA Agent Giacobbe received information that Mr. Brenna was involved in drug trafficking between 1982 and 1988; the premises were purchased by Ms. Goodwin with proceeds received from Mr. Brenna "as a gift"; the premises were purchased with cash wired from Mr. Murphy in the British Virgin Islands, whose business has been described above, to law offices in New Jersey; Mr. Brenna had deposited about $470,000.00 in cash with Mr. Murphy under an alias name and without explaining the source of same; Ms. Goodwin lived with Mr. Brenna during the years 1982 through 1988 during which time he supported her and her children; and neither Ms. Goodwin nor Mr. Brenna filed tax returns during the years 1979 through 1985. I find that these facts provide sufficient basis for probable cause to believe that the premises were purchased with proceeds traceable to drug transactions.

Compare United States v. 1982 Yukon Delta Houseboat, *supra*, 774 F.2d at 1435 ("[t]he above cited evidence certainly gives rise to a reasonable belief that Ray-May Corp. lacked a source of funds to purchase the houseboats itself, and that Parker used the income he derived from illegal narcotics transactions to purchase the houseboats, but arranged for Ray-May to front for him and to be the nominal owner"). Accordingly, since the government has demonstrated that it is entitled to forfeiture, it is immaterial whether or not the initial seizure was constitutional and I will not pass on that issue.

II. *Innocent Owner Defense*

The claimant contends that the complaint should be dismissed, because she has adequately satisfied her burden of showing that the property is not forfeitable. She claims that she has an "innocent owner" defense to the forfeiture. She asserts that she had no knowledge that the funds used to purchase the premises were traceable to drug sales; that the premises were used to facilitate drug sales; or that Mr. Brenna had a record of violating any laws. Goodwin Pet., ¶ 11.

In support of her innocent owner defense, it appears that the claimant relies upon 21 U.S.C. § 881 (a)(6), which provides, in pertinent part, that property subject to forfeiture includes:

> .... (6) All moneys . . . or other things of value furnished or intended to be furnished by any person in exchange for a controlled dangerous substance in violation of this subchapter, *all proceeds traceable to such an exchange*,[1] and all

[1] This reference to "all proceeds" clearly includes all types of property, including real and personal property. *See United States v. Premises Known as 8584 Old Brownsville Road*, 736

> moneys, . . . intended to be used to facilitate any violation of this subchapter, *except that no property shall be forfeited . . . to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.*

21 U.S.C. § 881(a)(6) (emphasis supplied).[2]

The government contends that the claimant is not entitled to invoke the innocent owner defense, because all right, title and interest in the proceeds of the narcotics transactions passed to the United States at the time of the sale, (*see* 21 U.S.C. § 881(h)), and thus, the claimant never acquired an interest in the property. *See* Government's Supplemental Brief at 16. It appears that some courts have rejected such an application of the relation back doctrine in deciding whether or not a claimant has an interest in property to have *standing* to object to the forfeiture. *See United States v. Miscellaneous Jewelry, supra,* at 249 and cases cited therein.[3] However, I believe there is

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F.2d 1129, 1130 (6th Cir.1984); *United States v. Parcels of Land, supra,* at 47 (1st Cir., 1990).

[2] A similar "innocent ownership" defense is set forth at subsection (a)(7) to this provision, which provides that real estate used to facilitate the commission of drug offenses is subject to forfeiture, "except that no property shall be forfeited under this paragraph, to the extent an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner." 21 U.S.C. § 881(a)(7).

[3] However, in *Miscellaneous Jewelry,* the court held that alleged heirs of property lacked standing to contest the forfeiture of the property which was traceable to and/or used to facilitate drug transactions. *See* 667 F.Supp. at 249.

a difference between the issue of whether a person has standing to object to a forfeiture and whether that forfeiture is permissible.[4]

I find that the claimant cannot successfully invoke the "innocent owner" defense here, because she admits that she received the proceeds to purchase the premises as a *gift* from Mr. Brenna. More particularly, I find that where, as here, the government has demonstrated probable cause to believe that property is traceable to proceeds from drug transactions, the innocent owner defense may only be invoked by those who can demonstrate that they are bona fide *purchasers for value. Accord United States v. One Single Family Residence, Miami,* 683 F.Supp. 783, 788 (S.D.Fla.1988) ("the innocent owner exception to forfeiture under section 881 also protects bona fide *purchasers for value*") (emphasis added).

In *One Single Family* residence, the court arrived at a similar conclusion after reviewing the legislative history behind the criminal and civil forfeiture provisions at 21 U.S.C. §§ 853(c) and 881. *See* 683 F.Supp. at 787. Also, the court took note that the typical case in which the innocent owner defense has been applied is where a person legitimately obtains ownership to property with untainted funds, and then the trafficker uses that property to facilitate his drug

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[4] The claimant has standing here, because, in addition to having legal title to the premises, she claims that she resided there for a number of years and treated the premises as her home. *Cf. United States v. One Parcel of Real Estate at 5860 N. Bay Road,* 121 F.R.D. 439, 440 (S.D.Fla.1988) ("possession of bare legal title by one who does not exercise dominion and control over the property is insufficient even to establish standing to challenge a forfeiture"). But, for reasons discussed *infra,* she does not have a legitimate innocent owner defense.

deals without the knowledge and consent of the owner. *See* 683 F.Supp. at 786. *See also United States v. One 107.9 A. Parcel of Land in Warren Tp.*, 898 F.2d 396, 397 (3d Cir.1990). In such a case, an innocent owner defense is necessary, because otherwise a legitimate property interest of a third party would be forfeited to the government for reasons entirely beyond the owner's control. *See Property Known as 6109 Grubb Road, supra*, 886 F.2d at 624-25. However, the same equities do not apply where, as here, there is probable cause to believe that the property was purchased with proceeds from drug transactions and given to the third party as a *gift*, because no investment has been made by the claimant.

This finding is consistent with the language of the civil forfeiture statute. In particular, the "innocent owner defense" at issue provides that "no property shall be forfeited . . . to the extent of the interest of *an owner*, by reason of any act or omission . . . committed or omitted without the knowledge or consent of *that owner*." 21 U.S.C. § 881(a)(6) (emphasis supplied). This language implies that the acts or omissions giving rise to forfeiture must be committed *after* the third party acquires a legitimate ownership interest in the property. In addition, if the drug trafficker purchases property with drug proceeds and *thereafter* conveys it as a gift, there is no reason for the drug trafficker to have obtained the consent of the transferee, and there is no incentive for the transferee to inquire as to the legitimacy of the transaction since no investment is being made.

The rule I have enunciated above—that the innocent owner defense cannot be invoked by the recipient of a gift of drug proceeds—is also buttressed by the analogous criminal forfeiture statute, traditional

legal precepts, and common sense. The "innocent owner" exception under the criminal forfeiture statute (which was codified after the exception had been in place under the civil forfeiture statute) protects only transferees who are bona fide purchasers for value. *See* 21 U.S.C. § 853(c). In addition, it is a traditional rule of law that those who do not have legal title to property cannot validly transfer it to others, and certain exceptions to this rule apply only where the transferee is a bona fide purchaser *for value*. *See, e.g.*, N.J.S.A. § 12A:2-403. Similarly, where fraudulant conveyances are made, bona fide purchasers for value may be protected, but recipients of gifts are not. *See, e.g.*, N.J.S.A. § 25:2-6. I simply do not believe that Congress intended for the innocent owner exception to permit a drug dealer to avoid the impact of the forfeiture statute by disbursing the proceeds from his drug transactions to "innocent" friends, family or other random recipients of the trafficker's benevolence.

Accordingly, I deny the claimant's motion for summary judgment to the extent it is based upon an "innocent owner" defense.[5]

III. *The Immunity Agreement*

The claimant argues that this action should be dismissed, because the Verified Complaint was based, at least in part, on immunized testimony. I disagree. The claimant was granted use immunity for her

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[5] Although I have found probable cause for forfeiture, I will not grant summary judgment in favor of the government, because the government has not so moved, and the claimant can still defeat the forfeiture by demonstrating, by a preponderance of the evidence, that the premises were not purchased with proceeds from drug trafficking.

testimony and not transactional immunity. *See* May 4, 1988 letter to Joel Kaplan, Esq., from Lynne W. Lamprecht, AUSA, annexed as page 2 to Exhibit A of Supplemental Plaisted Affidavit, filed Oct. 13, 1989; *see also* 18 U.S.C. § 6002. The government has adequately demonstrated, from other sources independent of Ms. Goodwin's testimony, that probable cause exists to support forfeiture of the premises. *See supra*, at Section I. Thus, I will not dismiss the Verified Complaint on the grounds that it is partly based upon immunized testimony.[6]

IV. *Alleged Undue Delay*

The claimant next argues that the government's complaint is barred, because it unduly delayed in the seizure in violation of her due process rights. The claimant argues that the government unduly delayed

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[6] The government has made the additional argument that it could use the testimony at issue, because this is not a criminal proceeding but a civil proceeding against the property. *See United States v. $39,000 in Canadian Currency*, 801 F.2d 1210, 1218 (10th Cir.1986). Various courts have permitted the use of immunized testimony in civil cases, even where the civil suit was somewhat penal in nature. *See, e.g., Childs v. Schlitz*, 556 F.2d 1178 1179 (4th Cir.1977) (license revocation proceedings); *United States v. Kates*, 419 F.Supp. 846, 857-58 (E.D.Pa.1976) (civil fraud action). However, in *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 85 S.Ct. 1246, 14 L.Ed.2d 170 (1965), the Court held that evidence seized in violation of the Fourth and Fourteenth Amendments could *not* be used in civil forfeiture proceedings, because such proceedings are quasi-criminal in nature. *See* 380 U.S. at 700, 85 S.Ct. at 1250. Although it appears that, in light of the *Plymouth Sedan* case, Ms. Goodwin's immunized testimony could not be used in this civil forfeiture proceeding, I need not dismiss the Verified Complaint, because, as discussed above, there is an independent basis to provide probable cause to forfeit the premises apart from Ms. Goodwin's testimony.

between the time at which the alleged criminal events occurred and the seizure of the property. The government responds that there can be no due process concerns, because forfeiture proceedings were instituted before the seizure and the seizure was instituted immediately thereafter.

To the extent that the claimant is arguing that the warrant authorizing the seizure was based upon "stale" information, her arguments lack merit. As explained by the court in *United States v. One 1978 Mercedes Benz*, *supra*, at 1301-02, "the passage of time between the occurrence of the facts giving rise to probable cause and the occurrence of the seizure is irrelevant" on the issue of statutory probable cause. *Mercedes Benz*, 711 F.2d at 1302.

Due process concerns are implicated where there is a delay between the seizure of the property and the postseizure filing of a judicial forfeiture action. *See United States v. Eight Thousand Eight Hundred and Fifty Dollars in U.S. Currency*, 461 U.S. 555, 563, 103 S.Ct. 2005, 2011, 76 L.Ed.2d 143 (1983) (standards used to determine whether right to speedy trial is violated are applicable in determining whether due process concerns arise as to delay between *seizure of the property and institution of forfeiture action*) (18-month delay held permissible). Each of the cases relied upon by the claimant in support of her due process claim involved delays between the seizure of property and institution of forfeiture proceedings. *See* Claimant's Brief at 22, *citing Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 94 S.Ct. 2080, 40 L.Ed.2d 452 (1974); *United States v. U.S. Treasury Bills Totalling $160,916.25*, 750 F.2d 900 (11th Cir.1985), and *United States v. One Motor Yacht Named Mercury*, 527 F.2d 1112 (1st Cir. 1975). Due process concerns arise in such a situation,

because a property owner is entitled to be heard at a meaningful time after the deprivation of property that is caused by a seizure. *See United States v. 8,850*, *supra*, 461 U.S. at 562, 103 S.Ct. at 2010. Notably, there has been no real deprivation in this case, because Ms. Goodwin has been permitted to continue to reside at the premises under an arrangement with the government. *See* Occupancy Agreement, Gallagher Aff. II, Exhibit D.

Moreover, there is no dispute that this forfeiture proceeding was instituted before the seizure. The claimant was afforded the opportunity to contest the forfeiture and engage in discovery shortly after the seizure. Thus, under the cases cited by the claimant, no due process concerns are implicated. To the extent there was any delay between the events giving rise to the forfeiture and the institution of these proceedings, the statute of limitations governs.

V. *Statute of Limitations*

Claimant argues that this action is barred by the applicable statute of limitations. However, I find no cogent reason to distinguish this case from *United States v. $116,000 in U.S. Currency*, 721 F.Supp. 701 (D.N.J.1989). In that case, Judge Wolin applied the statute of limitations set forth under the customs laws to actions brought under 19 U.S.C. § 1621. The customs laws require that the suit or action be "commenced within five years after the time when the alleged offense was *discovered*." *Id.*, at 703, *citing* 19 U.S.C. § 1621 (emphasis added). Although Judge Wolin was concerned with the statute of limitations under Section 1955(d) of Title 18, and here I am concerned with Section 881(a) of Title 21, both of these sections contain similar language incor-

porating the customs laws in general. The claimant argues that the government became aware of the events giving rise to this action in 1986 and thus, her motion to dismiss the complaint on statute of limitations grounds is denied.

VI. *Discovery Issues*

Lastly, the claimant argues that the government's refusal to engage in discovery justifies dismissal of the action. I disagree. However egregious a failure to abide by the discovery rules may be, the court is obliged to consider the appropriateness of alternative sanctions; dismissal is a drastic sanction, reserved for drastic cases, and should only be ordered where no lesser sanction is adequate. *See Poulis v. State Farm and Fire Casualty Co.*, 747 F.2d 863, 867-68 (3d Cir.1984).

Further, I do not find that plaintiff's alleged interference with discovery warrants sanctions. The claimant is primarily complaining that the government has not permitted discovery with respect to statements made by, and it has not permitted the deposition of, Joseph Mazacco. Mr. Mazacco is the government's chief informant in connection with what is now a pending criminal case. Thus, the government's refusal to permit discovery was not based upon any dilatoriness, willfulness or bad faith, but upon its concern over the outcome of criminal proceedings. Accordingly, the claimant's motion for dismissal of the Verified Complaint on the grounds that the goverment has not engaged in appropriate discovery is hereby denied.

VII. *Government's Motion for a Stay*

The government has moved for a stay of these proceedings pending trial of a criminal action in the

Southern District of Florida pursuant to 21 U.S.C. 881(i). This section provides that "[t]he filing of an indictment alleging a violation of this subchapter . . . which is also related to a civil forfeiture proceeding under this section shall upon motion of the United States and for good cause shown, stay the civil forfeiture proceeding." 21 U.S.C. § 881(i). In deciding whether a stay is appropriate, the court should exercise its discretion and determine whether the hardships to the claimant are outweighed by the government's interest in avoiding civil discovery. *See United States v. Mellon Bank, N.A.*, 545 F.2d 869, 872-73 (3d Cir.1976).

I find that the balance weighs in favor of granting the government's request for a stay. The government has demonstrated good cause in support of its request; this is evidenced by the claimant's insistence for disclosure of the statements made by Mr. Mazacco, the government's informant, and the government's refusal to produce same. *See United States v. One Single Family Residence*, 710 F.Supp. 1351, 1352 (S.D.Fla.1989) (government satisfied its burden of demonstrating good cause by representing that "civil discovery would substantially interfere with and prejudice the prosecution of the criminal action, because civil discovery is substantially more comprehensive and wide-reaching than is criminal discovery"). It does not appear that the hardship to the claimant is severe, as she has been permitted to reside at the premises under an occupancy agreement. Although the claimant complains that she is not indicted and the government is not seeking to forfeit *her* interest in the property in the criminal proceedings, stays are appropriate whether or not the same parties are involved in the criminal and civil litiga-

tion, provided the actions concern related transactions. *See Larouche Campaign v. FBI*, 106 F.R.D. 500, 501 (D.Mass.1985).

Accordingly, I shall grant the government's request for a stay of this civil proceeding pending trial of the criminal proceeding in the Southern District of Florida.

VIII. *Conclusion*

For all the reasons set forth above, I deny the claimant's motion to dismiss the Verified Complaint and I grant the government's request for a stay of this case pending the trial in the criminal proceeding.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

HON. HAROLD A. ACKERMAN
Civil Action No. 89-1411

UNITED STATES OF AMERICA, PLAINTIFF

v.

A PARCEL OF LAND, BUILDINGS, APPURTENANCES, AND IMPROVEMENTS KNOWN AS 92 BUENA VISTA AVE., RUMSON, NEW JERSEY, DEFENDANT

ORDER

[Filed Jul. 13, 1990]

This matter, having been brought before this Court upon the motion of the claimant, Ms. Beth Ann Goodwin, for dismissal of the complaint and for summary judgment; and the United States of America having opposed the claimant's motions on all grounds and having cross-moved for a stay of discovery and/or a stay of this action; and the Court having duly considered the papers submitted in support of and in opposition to said motions, as well as the oral arguments of counsel; and for the reasons stated in this Court's Opinion issued from the bench on May 29, 1990, and filed on June 1, 1990, as well as for the reasons expressed in the accompanying Opinion relating to the certification of this matter for appeal;

IT IS on this 13th day of July, 1990,

ORDERED that the claimant's motions to dismiss the complaint and for summary judgment are hereby denied in all respects; and it is further,

ORDERED that the motion of the United States of America for a stay of all proceedings herein pending trial of indictment no. 90-6055-CR-GONZALEZ(S) in the United States District Court for the Southern District of Florida is granted. Should the defendant Joseph Brenna's trial be severed from the trial of the remaining defendants because of his fugitive status, the claimant may move for relief from the stay of this matter after the trial of the remaining defendants; and it is further,

ORDERED that the claimant's application pursuant to 28 U.S.C. § 1292(b) to certify for appeal the issues in this Court's Opinion of June 1, 1990, relating to the claimant's motions to dismiss the complaint and for summary judgment is granted.

/s/ Harold A. Ackerman
HAROLD A. ACKERMAN
U.S.D.J.

APPENDIX D

UNITED STATES DISTRICT COURT
D. NEW JERSEY

Civ. A. No. 89-1411

UNITED STATES OF AMERICA, PLAINTIFF

v.

A PARCEL OF LAND, BUILDINGS, APPURTENANCES, AND IMPROVEMENTS KNOWN AS 92 BUENA VISTA AVE., RUMSON, NEW JERSEY, DEFENDANT

July 13, 1990

Order Aug. 7, 1990

OPINION ON REQUEST FOR CERTIFICATION TO APPEAL

HAROLD A. ACKERMAN, District Judge.

The United States of America has brought this civil forfeiture action, pursuant to 21 U.S.C. § 881, concerning property known as 92 Buena Vista Avenue, Rumson, New Jersey, (hereinafter the "premises"). Presently before the Court is an application by the claimant, Ms. Beth Ann Goodwin, for certification of this Court's denial of her summary judgment motion and grant of a stay in favor of the government.

The claimant, Ms. Goodwin, previously moved to dismiss the complaint and for summary judgment. Her motion for dismissal of the complaint was based upon the grounds that (1) the seizure of her home was unconstitutional, because there was no probable cause and no preseizure hearing; (2) the property is not subject to forfeiture, because Ms. Goodwin is an "innocent owner"; (3) the verified complaint was based, at least in part, on immunized testimony; (4) the government unduly delayed in the seizure and/or is barred by the statute of limitations; and (5) the government's refusal to engage in discovery justified dismissal of this action. The government opposed the claimant's motion on all grounds and cross-moved for a stay on discovery and/or a stay of this action.

By an Opinion issued from the bench on May 29, 1990, and filed on or about June 1, 1990, 738 F.Supp. 854,[1] this Court held that the claimant's motion should be denied in all respects and that the government's request for a stay should be granted. The claimant has applied to this Court requesting that the Order denying her summary judgment motion contain a certification permitting her the right to an appeal, pursuant to 28 U.S.C. § 1292(b), subject to the Court of Appeals' discretion. With regard to interlocutory decisions by district courts, 28 U.S.C. § 1292(b) provides:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opin-

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[1] Citations to this Opinion shall hereinafter be referred to as "Op." followed by the appropriate page number.

> ion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he [sic] shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order. . . .

28 U.S.C. § 1292(b) (emphasis supplied).

The Third Circuit set forth the standards governing certification of interlocutory appeals under this provision in *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 754 (3d Cir.) (*en banc*), cert. denied, 419 U.S. 885, 95 S.Ct. 152, 42 L.Ed.2d 125 (1974). According to *Katz*, the certification of a matter for appeal is discretionary. *Id.* at 754. Each of the three criteria for certification—that the matter (1) involve a controlling question of law; (2) offer substantial ground for difference of opinion as to its correctness; and (3) materially advance the ultimate termination of the litigation—must be satisfied. *Id.* In addition, "a district court must keep in mind the Third Circuit's admonition that section 1292(b) 'is to be used only in exceptional cases where an intermediate appeal may avoid protracted and expensive litigation.'" *Mattioni, Mattioni & Mattioni, Ltd., v. Ecological Shipping Corp.*, 530 F.Supp. 910, 917 (E.D. Pa.1981).

The first criteria is clearly satisfied here. All of the significant issues involved in this case have been resolved as a matter of law. The issues are also controlling and some involve constitutional questions. *See Johnson v. Alldredge*, 488 F.2d 820, 822-23 (3d Cir.), *cert. denied*, 419 U.S. 882, 95 S.Ct. 148, 42 L.Ed.2d 122 (1974) (questions on immunity, which are purely legal in nature, are appropriate for resolution by way of an interlocutory appeal); *Mattioni, supra*, at 917

(an issue is controlling where "if erroneous, [it] would be reversible error on final appeal"); *cf. Von Bulow by Auersperg v. Von Bulow*, 634 F.Supp. 1284, 1312-13 (S.D.N.Y.1986), *aff'd*, 811 F.2d 136 (2d Cir.), *cert. denied*, 481 U.S. 1015, 107 S.Ct. 1891, 95 L.Ed.2d 498 (1987) (certification is not appropriate with respect to a ruling which does not involve a question of law but an exercise of discretion).

In addition, while I do not for a moment doubt the correctness of the decision I rendered, I recognize that substantial grounds may exist for a difference of opinion. There are few cases discussing the constitutionality of the civil forfeiture of a residence in the absence of a pre-seizure hearing and the courts have taken differing approaches in resolving this issue. *Compare United States v. Property at 4492 S. Livonia Road, Livonia, New York*, 889 F.2d 1258, 1265 (2d Cir.1989), *reh'g denied*, 897 F.2d 659 (2d Cir.1990), with *United States v. A Single Family Residence and Real Property Located at 900 Rio Vista Blvd., Ft. Lauderdale, Fl.*, 803 F.2d 625, 632 (11th Cir.1986). A pronouncement by the Third Circuit as to the appropriate approach to take in resolving the constitutional questions implicated in such cases would certainly provide instructive precedent.

In addition, there is, apparently, no authority construing the innocent owner defense in a situation such as the present case, namely, where probable cause exists to believe that the property subject to civil forfeiture was purchased with drug proceeds and the claimant did not pay fair value. While there are a number of authorities supporting this Court's conclusion that the innocent owner defense does not apply in such a case, (*see United States v. One Single Family Residence, Miami*, 683 F.Supp. 783, 788 (S.D.Fla.

1988) and 738 F.Supp. at 859-61), there are authorities which could, arguably, support a contrary conclusion. *See, e.g., United States v. Four Million, Two Hundred Fifty-Five Thous.*, 762 F.2d 895, 905-06 (11th Cir.1985), *cert. denied*, 474 U.S. 1056, 106 S.Ct. 795, 88 L.Ed.2d 772 (1986) (indicating that the purpose of the innocent owner defense is to ameliorate the harshness of the rule that all proceeds from drug transactions are subject to forfeiture by requiring knowledge of the drug dealings). Further, with respect to the government's alleged undue delay in the seizure, I recognize that substantial grounds for difference of opinion may exist on this issue as well. *Compare* 738 F.Supp. at 861-62, with *United States v. Kemp*, 690 F.2d 397, 401 & n. 5 (4th Cir.1982). Thus, the second criteria for grant of certification is satisfied.[2]

Lastly, the third criteria is satisfied. Resolution of any one of a number of issues raised by the claimant in her favor could result in an immediate dismissal of this action.[3] On the other hand, this case has

[2] Although the question of whether testimony compelled under a grant of immunity may be used in civil forfeiture proceedings is also somewhat novel, I found that the government had established probable cause for the forfeiture by independent means, and I did not fully consider this issue. *See* 738 F.Supp. at 861 & n. 6.

[3] While reversal of this Court's decision could result in dismissal of this action, the denial of the claimant's summary judgment motion in this case verges on a final judgment for the government. In rendering my previous decision, I found that the government had established probable cause to support the forfeiture and that the claimant is not entitled to invoke the innocent owner defense. Thus, the case has effectively been decided in favor of the government, unless the claimant can prove, by a preponderance of the evidence, that the premises were not purchased with drug proceeds. *See* 738 F.Supp. at 857, 857 & 861 n. 5.

been stayed pending the criminal trial of Mr. Brenna who is now a fugitive and it is difficult to predict, given Mr. Brenna's fugitive status, how long it will be until the stay in this matter may be lifted. There is no apparent reason why the thorny and controlling legal issues posed by this case should not be presented to the Court of Appeals during the course of the stay of this matter. Indeed, this Court's grant of the stay, together with Mr. Brenna's fugitive status and the nature of the controlling legal issues implicated here renders this case "exceptional" and thus appropriate for certification. Accordingly, for all the foregoing reasons, I shall exercise my discretion and certify the issues raised by the claimant's summary judgment motion, as discussed above, for appeal pursuant to 28 U.S.C. § 1292(b).

ORDER

This matter, having been brought before the Court upon the motion of claimant, Ms. Beth Ann Goodwin, for dismissal of the Complaint and for summary judgment; and the United States of America having opposed said motions on all grounds and having cross-moved for a stay of discovery and/or stay of this action; and the Court having duly considered the papers submitted in support of and in opposition to said motions, as well as the oral arguments of counsel; and for the reasons stated in this Court's Opinion issued from the bench on May 29, 1990 and filed on June 1, 1990, as well as for the reasons expressed in the Opinion filed on July 13, 1990, relating to the certification of this matter for appeal; and it having come to the Court's attention that this Court's prior Order, dated

July 13, 1990 (concerning said motions and the request for certification), was not forwarded to claimant's counsel in time for claimant's counsel to file a petition for permission to appeal within ten days and in compliance with 28 U.S.C. § 1292(b); and for good cause shown,

ORDERED that this Court's prior Order dated July 13, 1990, is hereby vacated; and it is further,

ORDERED that the claimant's motions to dismiss the complaint and for summary judgment are hereby denied in all respects; and it is further,

ORDERED that the motion of the United States of America for a stay of this action pending trial of indictment no 90-6055-CR-GONZALEZ(S) in the United States District Court for the Southern District of Florida is granted. Should the defendant Joseph Brenna's trial be severed from the trial of the remaining defendants because of his fugitive status, the claimant may move for relief from the stay of this matter after the trial of the remaining defendants in that action; and it is further,

ORDERED that the claimant's application pursuant to 28 U.S.C. § 1292(b) to certify for appeal the issues in this Court's Opinion of June 1, 1990 relating to the claimant's motions to dismiss the complainant and for summary judgment is granted, on the grounds that such an appeal involves controlling questions of law as to which there are substantial grounds for difference of opinion and an immediate appeal may materially advance the ultimate termination of the litigation. The controlling questions of law are:

(1) Whether the seizure of claimant's home was unconstitutional because there was no preseizure

hearing and, if so, whether the forfeiture proceedings involving said home should be dismissed as a result;

(2) Whether an innocent owner defense may be asserted by a person who is not a bona fide purchaser for value concerning a parcel of land where the government has established probable cause to believe that the parcel of land was purchased with monies traceable to drug proceeds;

(3) Whether the verified complaint in this action was based, in part, upon immunized testimony and if so, whether the forfeiture proceedings must be dismissed as a result; and

(4) Whether the government's claims in this action are barred by the applicable statute of limitations and/or undue delay.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-5823

U.S.A.

vs.

A PARCEL OF LAND, BETH ANN GOODWIN,
APPELLANT

SUR PETITION FOR REHEARING

Present: SLOVITER, *Chief Judge*, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, and ROTH, *Circuit Judges*, and O'NEILL.*

The petition for rehearing filed by appellee in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

---

* District Judge O'Neill voted only as to panel rehearing.

Judges Becker, Stapleton, Cowen and Roth would have granted rehearing.

BY THE COURT,

/s/ Carol Los Mansmann
Circuit Judge

Dated: August 13, 1991

APPENDIX F

Section 511 of the Controlled Substances Act of 1970, 21 U.S.C. 881, provides:

§ 881. Forfeitures.

(a) Subject property

The following shall be subject to forfeiture to the United States and no property right shall exist in them:

(1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this subchapter.

(2) All raw materials, products, and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance in violation of this subchapter.

(3) All property which is used, or intended for use, as a container for property described in paragraph (1), (2), or (9).

(4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1), (2), or (9), except that—

(A) no conveyance used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited under the provisions of this section unless it shall appear

that the owner or other person in charge of such conveyance was a consenting party or privy to a violation of this subchapter or subchapter II of this chapter;

(B) no conveyance shall be forfeited under the provisions of this section by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, or of any State; and

(C) no conveyance shall be forfeited under this paragraph to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge, consent, or willful blindness of the owner.

(5) All books, records, and research, including formulas, microfilm, tapes, and data which are used, or intended for use, in violation of this subchapter.

(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no

property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

(7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

(8) All controlled substances which have been possessed in violation of this subchapter.

(9) All listed chemicals, all drug manufacturing equipment, all tableting machines, all encapsulating machines, and all gelatin capsules, which have been imported, exported, manufactured, possessed, distributed, or intended to be distributed, imported, or exported, in violation of a felony provision of this subchapter or subchapter II of this chapter.

(b) Seizure pursuant to Supplemental Rules for Certain Admiralty and Maritime Claims; issuance of warrant authorizing seizure

Any property subject to civil forfeiture to the United States under this subchapter may be seized by the Attorney General upon process issued pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims by any district court of the United States having jurisdiction over the property, except that seizure without such process may be made when—

(1) the seizure is incident to an arrest or a search under a search warrant or an inspection under an administrative inspection warrant;

(2) the property subject to seizure has been the subject of a prior judgment in favor of the United States in a criminal injunction or forfeiture proceeding under this subchapter;

(3) the Attorney General has probable cause to believe that the property is directly or indirectly dangerous to health or safety; or

(4) the Attorney General has probable cause to believe that the property is subject to civil forfeiture under this subchapter.

In the event of seizure pursuant to paragraph (3) or (4) of this subsection, proceedings under subsection (d) of this section shall be instituted promptly.

The Government may request the issuance of a warrant authorizing the seizure of property subject to forfeiture under this section in the

same manner as provided for a search warrant under the Federal Rules of Criminal Procedure.

(c) Custody of Attorney General

Property taken or detained under this section shall not be repleviable [sic], but shall be deemed to be in the custody of the Attorney General, subject only to the orders and decrees of the court or the official having jurisdiction thereof. Whenever property is seized under any of the provisions of this subchapter, the Attorney General may—

(1) place the property under seal;

(2) remove the property to a place designated by him; or

(3) require that the General Services Administration take custody of the property and remove it, if practicable, to an appropriate location for disposition in accordance with law.

(d) Other laws and proceedings applicable

The provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs laws; the disposition of such property or the proceeds from the sale thereof; the remission or mitigation of such forfeitures; and the compromise of claims shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under any of the provisions of this subchapter, insofar as applicable and not inconsistent with the provisions hereof; except that such duties as are imposed upon the customs

officer or any other person with respect to the seizure and forfeiture of property under the customs laws shall be performed with respect to seizures and forfeitures of property under this subchapter by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General, except to the extent that such duties arise from seizures and forfeitures effected by any customs officer.

(e) Disposition of forfeited property

(1) Whenever property is civilly or criminally forfeited under this subchapter the Attorney General may—

(A) retain the property for official use or, in the manner provided with respect to transfers under section 1616a of title 19, transfer the property to any Federal agency or to any State or local law enforcement agency which participated directly in the seizure or forfeiture of the property;

(B) sell any forfeited property which is not required to be destroyed by law and which is not harmful to the public;

(C) require that the General Services Administration take custody of the property and dispose of it in accordance with law;

(D) forward it to the Bureau of Narcotics and Dangerous Drugs for disposition (including delivery for medical or scientific use to any Federal or State agency under regulations of the Attorney General); or

(E) transfer the forfeited personal property or the proceeds of the sale of any forfeited personal or real property to any foreign country which participated directly or

indirectly in the seizure or forfeiture of the property, if such a transfer—

(i) has been agreed to by the Secretary of State;

(ii) is authorized in an international agreement between the United States and the foreign country; and

(iii) is made to a country which, if applicable, has been certified under setion 2291(h) of title 22.

(2)(A) The proceeds from any sale under subparagraph (B) of paragraph (1) and any moneys forfeited under this subchapter shall be used to pay—

(i) all property expenses of the proceedings for forfeiture and sale including expenses of seizure, maintenance of custody, advertising and court costs; and

(ii) awards of up to $100,000 to any individual who provides original information which leads to the arrest and conviction of a person who kills or kidnaps a Federal drug law enforcement agent.

Any award paid for information concerning the killing or kidnapping of a Federal drug law enforcement agent, as provided in clause (ii), shall be paid at the discretion of the Attorney General.

(B) The Attorney General shall forward to the Treasurer of the United States for deposit in accordance with section 524(c) of title 28, any amounts of such moneys and proceeds remaining after payment of the expenses provided in subparagraph (A), except that, with respect to forfeitures conducted by the Postal Service, the

Postal Service shall deposit in the Postal Service Fund, under section 2003(b)(7) of title 39, such moneys and proceeds.

(3) The Attorney General shall assure that any property transferred to a State or local law enforcement agency under paragraph (1)(A)—

(A) has a value that bears a reasonable relationship to the degree of direct participation of the State or local agency in the law enforcement effort resulting in the forfeiture, taking into account the total value of all property forfeited and the total law enforcement effort with respect to the violation of law on which the forfeiture is based; and

(B) will serve to encourage further cooperation between the recipient State or local agency and Federal law enforcement agencies.

(f) Forfeiture and destruction of schedule I and II substances

(1) All controlled substances in schedule I or II that are possessed, transferred, sold, or offered for sale in violation of the provisions of this subchapter shall be deemed contraband and seized and summarily forfeited to the United States. Similarly, all substances in schedule I or II, which are seized or come into the possession of the United States, the owners of which are unknown, shall be deemed contraband and summarily forfeited to the United States.

(2) The Attorney General may direct the destruction of all controlled substances in schedule I or II seized for violation of this subchapter un-

der such circumstances as the Attorney General may deem necessary.

(g) Plants

(1) All species of plants from which controlled substances in schedules I and II may be derived which have been planted or cultivated in violation of this subchapter, or of which the owners or cultivators are unknown, or which are wild growths, may be seized and summarily forfeited to the United States.

(2) The failure, upon demand by the Attorney General or his duly authorized agent, of the person in occupancy or in control of land or premises upon which such species of plants are growing or being stored, to produce an appropriate registration, or proof that he is the holder thereof, shall constitute authority for the seizure and forfeiture.

(3) The Attorney General, or his duly authorized agent, shall have authority to enter upon any lands, or into any dwelling pursuant to a search warrant, to cut, harvest, carry off, or destroy such plants.

(h) Vesting of title in United States

All right, title, and interest in property described in subsection (a) of this section shall vest in the United States upon commission of the act giving rise to forfeiture under this section.

(i) Stay of civil forfeiture proceedings

The filing of an indictment or information alleging a violation of this subchapter or subchapter II of this chapter, or a violation of State or

local law that could have been charged under this subchapter or subchapter II of this chapter, which is also related to a civil forfeiture proceeding under this section shall, upon motion of the United States and for good cause shown, stay the civil forfeiture proceeding.

(j) Venue

In addition to the venue provided for in section 1395 of title 28 or any other provision of law, in the case of property of a defendant charged with a violation that is the basis for forfeiture of the property under this section, a proceeding for forfeiture under this section may be brought in the judicial district in which the defendant owning such property is found or in the judicial district in which the criminal prosecution is brought.

(l) Agreement between Attorney General and Postal Service for performance of functions

The functions of the Attorney General under this section shall be carried out by the Postal Service pursuant to such agreement as may be entered into between the Attorney General and the Postal Service.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 312324 49145

No. 91-781

In The

Supreme Court of the United States

October Term, 1991

UNITED STATES OF AMERICA,

Petitioner,

v.

A PARCEL OF LAND, BUILDINGS, APPURTENANCES AND IMPROVEMENTS KNOWN AS 92 BUENA VISTA AVENUE, RUMSON, NEW JERSEY, AND BETH ANN GOODWIN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF FOR THE RESPONDENT, BETH ANN GOODWIN

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RESTATEMENT OF THE QUESTION PRESENTED

Whether a statute which provides protection from quasi-criminal forfeitures to "innocent owners" should be construed instead only to provide protection to bona fide purchasers?

The Court has requested that we file a response to the government's petition for certiorari on the innocent owner issue. For the reasons that follow and as set forth in our Reply Memorandum filed simultaneously with this brief, the Court should summarily affirm the decision below on the innocent owner issue and grant review of the Questions Presented in our cross-petition for certiorari (No. 91-1052).

As the government would have it, the innocent owner defense is only available to a person who is a bona fide purchaser for value. But the plain language of 21 U.S.C. 881(a)(6) shows that protection from civil forfeiture is provided to all innocent owners and not merely to innocent owners who are bona fide purchasers for value. Thus, the statute does not limit protection from forfeiture to bona fide purchasers for value.

Congress expressed its intention through unequivocal language when it intended that relief from forfeitures should only be available to "bona fide purchasers." *See* 18 U.S.C. 2963(c) and 12 U.S.C. 853(c). That language was not utilized in 21 U.S.C. 881(a)(6) but rather Congress used the broader language offering protection to all "innocent owners." As the Third Circuit properly noted, the decisions cited by the government which appear to limit protection provided by that section to bona fide purchasers are contrary to the plain statutory language. (App. 8a-9a).

The legislative history pertinent to this statutory provision confirms that Congress intended to exempt all subsequent innocent owners from forfeiture under 21

U.S.C. 881 and not just bona fide purchasers for value. As the Congressional Record specifically indicates:

> Finally, it should be pointed out that no property would be forfeited . . . to the extent of the interest of any innocent owner of such property. The term "owner" should be broadly interpreted to include any person with a recognizable legal or equitable interest in the property seized. *Specifically, the property would not be subject to forfeiture unless the owner of such property knew or consented* to the fact that:
>
> 1) the property was furnished or intended to be furnished in exchange for a controlled substance in violation of law,
>
> 2) *the property was proceeds traceable to such an illegal exchange, or*
>
> 3) the property was used or intended to be used to facilitate any violation of Federal illicit drug laws. (emphasis added)

1978 U.S. Code Cong. & Admin. News at 9522-23.

Senators Culver and Nunn spoke on the floor of the Senate regarding the innocent owner provision. Senator Culver explained that the innocent owner provision was added as a result of "concerns" expressed by members of the Juvenile Delinquency Subcommittee:

> Specifically, it was noted that the original language could have been construed to reach properties traceable to the illegal proceeds but obtained by an innocent party without knowledge of the manner in which the proceeds were obtained. The original language is modified in the proposed amendments in order to protect

> the individual who obtains ownership of proceeds with no knowledge of the illegal transaction. (Cong. Rec. S.23056 (July 27, 1978)) (emphasis supplied).

Senator Nunn stated that the innocent owner provision was added:

> . . . to make it clear that a bona fide party who has no knowledge or consent to the property he owns having been derived from an illegal transaction, that party would be able to establish that fact under this amendment and forfeiture would not occur.
>
> That is the purpose of the wording added to the modification in addition to some other wording in the modification making the amendment broader than it otherwise would have been. (Cong. Rec. S.23057 (July 27, 1988)) (emphasis supplied).

We believe that this Court should apply the doctrine set forth in *United States v. Coin and Currency*, 401 U.S. 715 (1971) where this Court stated:

> When the forfeiture statutes are viewed in their entirety, it is manifest that they are intended to impose a penalty only upon those who are significantly involved in a criminal enterprise.

401 U.S. 721-22.

The government suggests that the federal criminal case against Brenna will operate to deprive Goodwin of her home and that this possibility creates an anomaly caused by the Third Circuit decision. (Gov't. petition at p.21 n.10). No such anomaly exists. Goodwin has title to the property and has possessed it for a decade. The

government can only forfeit Brenna's interest in the property in his criminal case and Brenna has never owned the property. Surely the government does not contend it can deprive Goodwin of her home in a criminal case to which she is not a party and has never been charged.

CONCLUSION

For the reasons stated, the Court should summarily affirm the decision below on the innocent owner issue and grant our cross-petition for certiorari (No. 91-1052).

Respectfully submitted,

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(3)

No. 91-781

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

A PARCEL OF LAND, BUILDINGS, APPURTENANCES AND IMPROVEMENTS KNOWN AS 92 BUENA VISTA AVENUE, RUMSON, NEW JERSEY, AND BETH ANN GOODWIN

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a person who receives a gift of money derived from drug trafficking, and uses that money to purchase real property, can assert an "innocent owner" defense to civil forfeiture of the real property under 21 U.S.C. 881(a)(6).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 937 F.2d 98. The opinions of the district court denying respondent Goodwin's motion for summary judgment (Pet. App. 17a-35a) and certifying certain questions for interlocutory appeal (Pet. App. 38a-45a) are reported, respectively, at 738 F. Supp. 854 and 742 F. Supp. 189.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 1991. A petition for rehearing was denied on August 13, 1991. Pet. App. 46a-47a. The petition for a writ of certiorari was filed on November 12, 1991 and was granted on March 2, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 511 of the Controlled Substances Act of 1970, 21 U.S.C. 881, is reprinted in its entirety at Pet. App. 48a-57a. 21 U.S.C. 881(a)(6) provides:

> The following shall be subject to forfeiture to the United States and no property right shall exist in them:
>
> * * * * *
>
> (6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of [21 U.S.C. 801-904], all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

21 U.S.C. 881(h) provides:

> Vesting of title in United States
>
> All right, title, and interest in property described in subsection (a) of this section shall vest in the United States upon commission of the act giving rise to forfeiture under this section.

STATEMENT

This case arises from the government's attempt to enforce a civil forfeiture under 21 U.S.C. 881(a)(6) of a house located at 92 Buena Vista Avenue in Rumson, New Jersey. Respondent Beth Ann Goodwin purchased the house in 1982 with more than $200,000 provided by her companion, Joseph Brenna, who lived with her in the house from 1982 to 1987. Both courts below found probable cause to believe Brenna obtained the purchase money through illegal drug transactions. Respondent claims, however, that she was unaware that Brenna was involved in drug-related activities or that the money was derived from drug dealing. The court of appeals held that respondent's claims, if proved, would support an "innocent owner" defense against forfeiture under 21 U.S.C. 881(a)(6). The government sought review in this Court, contending that, because respondent obtained her interest in the house after the events giving rise to forfeiture of the purchase money, she is not eligible to assert the innocent owner defense to forfeiture under Section 881(a)(6). This Court granted certiorari, 112 S. Ct. 1260 (1992).

1. Under 21 U.S.C. 881, assets that are used in, or derived from, drug trafficking are subject to forfeiture. In particular, Section 881(a)(6) authorizes the forfeiture of "proceeds traceable" to a drug transaction, including property purchased with drug proceeds.[1] A forfeiture mandated by Section 881 is en-

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[1] Subsection (a)(6) was enacted in 1978 as an amendment to Section 511 of the Controlled Substances Act of 1970. See

forced by means of an *in rem* action against the assets in question.

Under the common law doctrine known as "relation back," see *United States* v. *Stowell*, 133 U.S. 1, 16-17 (1890), title to property subject to forfeiture under federal statute vests in the United States at the time of the act triggering the forfeiture, unless the statute indicates otherwise. See *Henderson's Distilled Spirits*, 81 U.S. (14 Wall.) 44, 56-57 (1871). Thereafter, the United States owns the property and no valid interest can pass to any other party, regardless of subsequent events or transactions. See *Stowell*, 133 U.S. at 17.

The relation back doctrine is codified in Sections 881(a) and 881(h) of the civil forfeiture statute. Section 881(h), which was added in 1984 as part of the Comprehensive Crime Control Act, Pub. L. No. 98-473, § 306, 98 Stat. 2051, provides that "[a]ll right, title, and interest in property described in" Section 881(a) "vest[s] in the United States *upon commission of the act giving rise to forfeiture*" (emphasis added). Section 881(a) states that "no property right shall exist" in property that belongs to the United States as the result of an act triggering forfeiture under its subsections.

Certain subsections of the civil forfeiture statute, including Section 881(a)(6), contain a proviso that

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Psychotropic Substances Act of 1978, Pub. L. No. 95-633, § 301, 92 Stat. 3777. A Joint Explanatory Statement concerning the amendment, which appears at 124 Cong. Rec. 34,671 (1978), states that drug proceeds "would still be subject to for iture" even if "involved in intervening legitimate transactions," and that property that constitutes the proceeds of such transactions is forfeit "if there is a traceable connection [between] such property and the illegal exchange of controlled substances."

has come to be known as the "innocent owner" defense. Like Sections 881(a)(4) and 881(a)(7)—which authorize the forfeiture, respectively, of conveyances and real property used to commit drug offenses—Section 881(a)(6) provides that "no property shall be forfeited * * * to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner." Since no one other than the United States can acquire a valid ownership interest in property after it becomes subject to forfeiture, it is the position of the government that the "innocent owner" defense can only be asserted by a claimant who acquired an interest in the property *before* commission of the act triggering the forfeiture.

2. a. The government commenced this action in 1989 by filing a verified complaint against the property at issue. J.A. 11-16. The complaint alleges that the property was purchased with money provided by Joseph Brenna; that those funds were proceeds traceable to illegal drug transactions; and that, consequently, the property is subject to forfeiture under 21 U.S.C. 881(a)(6). Finding probable cause to support the complaint, the district court issued a warrant authorizing seizure of the property. J.A. 18-21. Following seizure of the house, Goodwin has continued to occupy it under an occupancy/tenant agreement with the United States Marshals Service. C.A. App. 54a-55a.

Goodwin answered the complaint and asserted a claim to the property. J.A. 22-23. In motions to dismiss and for summary judgment, she argued, *inter alia*, that there was no probable cause to believe the property was purchased with proceeds of drug traf-

ficking and that she was an "innocent owner" of the property within the meaning of Section 881(a)(6). In support of her innocent owner defense, Goodwin asserted that she lived with Brenna from approximately 1981 through 1987 in an "intimate personal relationship," that he supported her and her children until the two separated in 1987, that he gave her the funds used to purchase the house as a gift, and that she had no knowledge that the money was derived from illegal drug transactions. J.A. 31-33; Pet. App. 22a.

b. The district court denied Goodwin's motions. Relying in part on the fact that a federal grand jury in the Southern District of Florida had indicted Brenna for drug offenses yielding proceeds in excess of $25 million in cash, including the money used to purchase the property at 92 Buena Vista Avenue,[2] the court found probable cause to believe that the property was traceable to drug transactions. Pet. App. 21a. The court noted that a DEA agent had verified the allegations of the forfeiture complaint, that an informant had advised the government that the house was purchased with drug proceeds, and that neither Brenna nor Goodwin had filed income tax returns from 1978 through 1985. *Id.* at 21a-23a.

The court also observed that the money used to purchase the house had first passed through the hands

[2] The Florida indictment, returned in April 1990, charges Brenna with two counts of violating the Continuing Criminal Enterprise (CCE) statute (21 U.S.C. 848); one count of conspiring to import in excess of 1000 kilograms of marijuana (21 U.S.C. 963); and four counts of importing in excess of 1000 kilograms of marijuana (21 U.S.C. 952(a)). J.A. 34-40. Brenna was a fugitive until recently and has not yet been brought to trial.

of an accountant in the British Virgin Islands. The evidence before the court revealed that the accountant assigned his clients pseudonyms and code words to conceal their identities, made a practice of picking up money in St. Thomas and carrying it to Tortolla in the British Virgin Islands, and shredded all "wastepaper" on a daily basis. The accountant had assigned Brenna the pseudonym "Joseph Smith" and the phrase "Mohave is warm this time of year" to identify himself over the telephone. See Pet. 6. As the court summarized, the accountant testified in deposition that he had received $470,000 in two cash deliveries from Brenna in 1982 and, on Brenna's instructions, had wired $216,000 of that amount to a law firm in New Jersey; those were the funds used to purchase the property that the government seeks to forfeit in this case. *Id.* at 23a-24a.

The district court also rejected Goodwin's innocent owner defense. Noting that Goodwin had characterized the funds used to buy the house as a gift, the court held that "where, as here, the government has demonstrated probable cause to believe that property is traceable to proceeds from drug transactions, the innocent owner defense may only be invoked by those who can demonstrate that they are bona fide *purchasers for value*." Pet. App. 27a. In so holding, the court relied on the language of the statute, the analogous criminal forfeiture statute (21 U.S.C. 853(c)), principles of property law, and common sense. Pet. App. 28a-29a. The court explained that it was unlikely "that Congress intended for the innocent owner exception to permit a drug dealer to avoid the impact of the forfeiture statute by disbursing the proceeds from his drug transactions to 'innocent' friends,

family or other random recipients of the trafficker's benevolence." *Id.* at 29a.

c. On interlocutory appeal certified by the district court under 28 U.S.C. 1292(b), the Third Circuit reversed. Although the court agreed that there was probable cause to believe the property was traceable to drug transactions, Pet. App. 14a, it held that "Goodwin need not be a bona fide purchaser for value to raise an innocent owner defense pursuant to section 881(a)(6)." *Id.* at 8a. The court reasoned that the statute "speaks only in terms of an 'owner' and in no way limits the term 'owner' to a bona fide purchaser for value." *Id.* at 7a. Observing that the statute authorizing criminal forfeitures in drug cases expressly excludes property transferred to bona fide purchasers for value, the court inferred from the absence of a similar provision in Section 881 that Congress intended to omit any requirement that a claimant be a purchaser to qualify as an innocent owner under the statute. Pet. App. 7a-8a. In addition, the court expressed concern that the government's position would apply to purchasers of drug proceeds as well as donees, a result that the court thought would "emasculate the innocent owner defense," *id.* at 9a, and "contravene the express legislative intent that [courts] interpret 'owner' broadly." *Id.* at 7a. The government suggested rehearing en banc, which the court denied over the dissent of four of its members. *Id.* at 46a-47a.

SUMMARY OF ARGUMENT

1. This Court has long recognized that the innocence of the owner of property is no defense to civil forfeiture of that property through *in rem* actions under federal statute. See *Various Items of Personal Property* v. *United States*, 282 U.S. 577, 581 (1931); *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 683-684 (1974). Under the common law doctrine known as "relation back," title to property subject to forfeiture under federal statute vests in the United States at the time of the act triggering the forfeiture, unless the statute indicates otherwise. Thereafter, the United States owns the property and no subsequent transfer can give rise to a legally valid third-party interest, regardless of the innocence of the party acquiring the property. *Henderson's Distilled Spirits*, 81 U.S. (14 Wall.) at 56-57; *United States* v. *Stowell*, 133 U.S. at 16-17.

2. The relation back doctrine applies with full force to forfeitures under 21 U.S.C. 881(a)(6), which covers "proceeds traceable" to a drug transaction, including property purchased with drug proceeds. Sections 881(a) and 881(h) codify the common law doctrine of relation back in the civil forfeiture statute. Section 881(a) states that "no property right shall exist" in property that belongs to the United States as the result of an act triggering forfeiture under its subsections. Section 881(h), enacted after subsection (a)(6) was added to the statute, provides that "[a]ll right, title, and interest in property described in" Section 881(a) "vest[s] in the United States *upon commission of the act giving rise to forfeiture*" (emphasis added). The effect of applying the relation back doctrine codified in these provisions to forfeitures under Section 881(a)(6) is that the

government's claim to drug proceeds or assets used to facilitate a drug transaction vests upon commission of the act resulting in forfeiture and cannot be compromised by any subsequent transfer.

3. a. Section 881(a)(6) contains a proviso, known as the "innocent owner" defense, specifying that "no property shall be forfeited * * * to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner." Congress's choice of the word "owner" to designate the category of individuals eligible to avoid forfeiture under Section 881(a)(6) makes the defense unavailable to parties acquiring interests in property after the event triggering forfeiture. Under the relation back doctrine, no one other than the United States can acquire a valid ownership interest in property after it becomes subject to forfeiture. Thus, no one who acquires property after forfeiture attaches can be an "owner" under the statute—innocent or otherwise.

b. The terms of the innocent owner defense in Section 881(a)(6) are consistent with precluding assertion of the defense by those, such as respondent Goodwin, who acquire the property after forfeiture attaches. Section 881(a)(6) permits an owner to avoid forfeiture "by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner." By requiring the owner to prove that the acts giving rise to forfeiture took place without his knowledge or consent, the statute looks to the owner's state of mind *at the time the acts were committed.* By making contemporaneous knowledge or consent the only test of innocence, the statute permits a party

acquiring tainted property through a subsequent transfer to avoid forfeiture by showing that he had not previously encountered the offender and was unaware of the offense at the time it was committed, even if he learned of the offense subsequently but before acquiring the property. A drug dealer could circumvent forfeiture by later conveying property to a friend or relative who was not a party to the illicit activity but became aware of it afterwards and knew that the purpose of the transfer was to defeat forfeiture. This absurd result is avoided by recognizing that the defense in Section 881(a)(6) is, by it terms, available only to an "owner"—*i.e.*, one who acquired his interest prior to the illegal acts giving rise to forfeiture.

c. The court of appeals did not attempt to reconcile the relation back doctrine of Section 881(h) with the innocent owner defense of Section 881(a)(6), but rather concluded that the relation back doctrine simply does not apply to property covered by the innocent owner defense. That, however, is not what the statute says. Section 881(h) specifies that "[a]ll right, title, and interest in property described in subsection (a)" vests in the United States at the time of the illegal act. Property covered by the innocent owner defense of Section 881(a)(6) is "property described in subsection (a)." Therefore, the relation back doctrine applies to that property. If the terms of the innocent owner defense are met, the United States must relinquish the property, but application of the relation back doctrine ensures that only persons who owned the property before commission of the illegal acts giving rise to forfeiture can avail themselves of the innocent owner defense.

d. The government's construction of the innocent owner defense in Section 881(a)(6) is buttressed by the fact that Congress used very different words in other forfeiture statutes to create an exemption for property acquired by innocent third parties *after* the events leading to forfeiture. In the criminal forfeiture statute, 21 U.S.C. 853, Congress explicitly recognized that property "transferred to a person other than the defendant" after the illegal act occurs is subject to forfeiture, but nonetheless permitted a "transferee" to avoid forfeiture if he could establish that he was a bona fide purchaser for value and that, "at the time of purchase," he was "reasonably without cause to believe that the property was subject to forfeiture." 21 U.S.C. 853(c); see also 18 U.S.C. 1963(c). Implicitly recognizing that after-acquirors cannot be "owners" under the relation back doctrine, Congress used the term "transferee" in that statute to designate the class of subsequent bona fide purchasers entitled to claim the property. Also, in contrast with Section 881(a)(6), Congress made the test of "innocence" under Section 853(c) turn on whether the purchaser had reason to believe that the property was subject to forfeiture *at the time of purchase*. This criterion—and not the claimant's awareness of the acts giving rise to forfeiture at the time they were committed—is the one that Congress would be expected to adopt for persons receiving property after the events giving rise to forfeiture, because those persons may not acquire guilty knowledge of the tainted source of the assets until after those events occurred.

4. The unavailability of the innocent owner defense under subsection (a)(6) will not result in the confiscation of property in the hands of truly blameless parties. The harshness of statutory forfeiture is

tempered by administrative procedures for remission and mitigation promulgated by the Attorney General under authority granted in Section 881(d). The remission procedure is available to "any person interested" (19 U.S.C. 1618) in seized or forfeited property—a category that includes transferees of property that has already become subject to forfeiture. The regulations establish a simple and informal extrajudicial procedure by which bona fide purchasers or recipients of gifts of tainted assets can attempt to reclaim property by demonstrating that they were unaware of its involvement with illegal activities. 28 C.F.R. 9.5(b). Thus, a holding that the legal innocent owner defense to judicial forfeiture in Section 881(a)(6) is unavailable to persons who unknowingly receive gifts of drug proceeds would not deprive those persons of all opportunity to attempt to regain the property. Rather, it would simply require them to avail themselves of a different set of procedures for proving their ignorance of the drug transactions from which the property derives.

5. Extending the innocent owner defense to recipients of gifts of drug proceeds would undermine the effectiveness of civil forfeitures in the enforcement of federal drug laws. Congress has made clear that forfeitures play an essential role in efforts to eradicate drug trafficking. Permitting the "innocent owner" exception to be invoked by recipients of tainted property, even if ignorant of the source of their gifts, would undercut the effectiveness of forfeitures. Such a rule would enable drug dealers to realize benefits from their illegal activities by distributing their wealth to relatives, friends, and others with whom they seek to curry favor. As in this case, they could even enjoy the use of very valuable prop-

erty that they have given to their most intimate companions. In addition, this interpretation would encourage drug dealers to use nominees to conceal their assets, since even close associates of drug dealers can contend, as respondent Goodwin does here, that they were unknowing recipients of gifts of drug proceeds. By transferring assets to third persons, drug traffickers can seriously impede the government's efforts to obtain forfeiture of assets that are demonstrably traceable to drug transactions.

ARGUMENT

RESPONDENT GOODWIN CANNOT INVOKE THE INNOCENT OWNER DEFENSE UNDER SECTION 881(a)(6) TO AVOID FORFEITURE OF PROPERTY PURCHASED WITH THE PROCEEDS OF A DRUG TRANSACTION

A. No Party Other Than The United States Can Obtain An Ownership Interest In Property After The Events Giving Rise To Civil Forfeiture Under Federal Statute

1. The concept of forfeiture traces its origin to the English common law practice of confiscating "deodands", which were objects that caused the death of human beings. Since, in the eyes of the common law, the object was the guilty party, it was irrelevant whether the person to whom the offending res belonged was innocent of any wrongdoing. See *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 681 (1974).

Although "[d]eodands did not become part of the common-law tradition of this country," *Calero-Toledo*, 416 U.S. at 682, colonial courts regularly exercised jurisdiction *in rem* to enforce English and local forfeiture statutes against commodities and vessels used in violation of customs and revenue laws. Laws providing for forfeiture of property involved in crim-

inal activity were among the earliest statutes enacted by Congress. See, *e.g.*, Act of July 31, 1789, ch. 5, §§ 12, 36, 1 Stat. 39, 47 (forfeiture of ships and cargoes involved in customs offenses); Act of Aug. 4, 1790, ch. 35, §§ 12-16, 22, 27-28, 67, 1 Stat. 157-159, 161, 163-164, 176 (same); *C. J. Hendry Co.* v. *More*, 318 U.S. 133, 139, 145-148 (1943); *Boyd* v. *United States*, 116 U.S. 616, 623 (1886); *Calero-Toledo*, 416 U.S. at 682-683.

Consistent with these historical origins, civil forfeiture under federal statute is effected through actions *in rem*, with the tainted object named as the defendant and treated as the offender. As the Court explained in *Various Items of Personal Property* v. *United States*, 282 U.S. 577, 581 (1931), "[i]t is the property which is proceeded against, and, by resort to a legal fiction, held guilty and condemned as though it were conscious instead of inanimate and insentient." Accordingly, not only has conviction of the owner for a crime never been a prerequisite to civil forfeiture, but, in interpreting early forfeiture statutes, this Court uniformly rejected as a defense the innocence of the owner of the property subject to forfeiture. *Calero-Toledo*, 416 U.S at 683-684, citing *The Palmyra*, 25 U.S. (12 Wheat.) 1, 14-15 (1827) (conviction for piracy is not prerequisite to forfeiture of ship engaged in piratical aggression); *United States* v. *Brig Malek Adhel*, 43 U.S. (2 How.) 210, 233 (1844) (forfeiture of ship engaged in piracy upheld where owner's innocence was "fully established"). Forfeitures have been held effective even against an innocent owner who leased, lent, sold on condition of future payment, or otherwise entrusted his property to the wrongdoer, without knowledge of, or involvement in, the acts working a forfeiture. See,

e.g., *Dobbins's Distillery* v. *United States*, 96 U.S. 395, 401 (1878) (innocent lessor); *J.W. Goldsmith, Jr.-Grant Co.* v. *United States*, 254 U.S. 505, 510-511 (1921) (innocent lienor); see also *United States* v. *One Ford Coupe Automobile*, 272 U.S. 321, 332-333 (1926); *General Motors Acceptance Corp.* v. *United States*, 286 U.S. 49, 57 (1932).

2. For nearly two centuries, this Court has interpreted forfeitures under federal statutes to take place at the moment of illegal use, unless the statute provides otherwise.[3] At that instant, all rights and legal title to the property pass to the United States. Although this aspect of the common law rule is referred to as "relation back," that term is something of a misnomer: the judicial forfeiture proceedings simply confirm or proclaim that the forfeiture took place at the time of illegal use. See *United States* v. *1960 Bags of Coffee*, 12 U.S. (8 Cranch) 398, 405 (1814) ("the commission of the offence marks the point of time on which the statutory transfer of right takes place"); *Gelston* v. *Hoyt*, 16 U.S. (3 Wheat.) 245, 311 (1818) ("forfeiture must be deemed to attach, at the moment of the commission of the offence, and, consequently, from that moment, the title of the plaintiff would be completely devested [*sic*]").

Moreover, this Court has repeatedly held that once property becomes subject to forfeiture, title vests in

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[3] See *Caldwell* v. *United States*, 49 U.S. (8 How.) 366, 381 (1850) (distinguishing between statutes that provide for forfeiture upon the doing of an act, in which case title relates back to the time of the act, and statutes that allow an election as to what property will be forfeited, in which case the forfeiture occurs at the time of the election); *United States* v. *Grundy & Thornburgh*, 7 U.S. (3 Cranch) 337, 352-354 (1806) (same).

the government absolutely: no subsequent transfer can give rise to a legally valid third-party interest in the property. In *United States* v. *Stowell*, 133 U.S. at 16-17, applying "the settled doctrine" that "the forfeiture takes effect immediately upon the commission of the act" giving rise to forfeiture, this Court explained that "the right to the property then vests in the United States * * * and avoids *all intermediate sales and alienations, even to purchasers in good faith*" (emphasis added).

The Court has consistently adhered to this principle in interpreting a wide variety of forfeiture statutes. In *United States* v. *1960 Bags of Coffee*, 12 U.S. (8 Cranch) 398 (1814), the Court rejected a contention by bona fide purchasers of coffee that a forfeiture under the Non-Intercourse Act of March 1, 1809, ch. 24, 2 Stat. 528, took effect only when the property in question was seized and condemned. The Court explained that "the commission of the offence marks the point of time on which the statutory transfer of right takes place," rejecting the notion that "by a sale, it is put in the power of an offender to purge a forfeiture." 12 U.S. (8 Cranch) at 405. See also *United States* v. *The Brigantine Mars*, 12 U.S. (8 Cranch) 417 (1814) (affirming a seizure and forfeiture of a ship in the hands of an innocent bona fide purchaser on "the principle established in [*1960 Bags of Coffee, supra*]"); *Henderson's Distilled Spirits*, 81 U.S. (14 Wall.) at 56-58 (affirming the "rule * * * of this court for more than half a century," that "it is not in the power of the offender or former owner to defeat the forfeiture by any subsequent transfer of the property even to a *bona fide* purchaser for value without notice of the wrongful acts done and committed"); *Thacher's Distilled Spirits*, 103

U.S. 679, 682 (1880) (government's title to "tainted" property "attaches at once and may be pursued by the government whenever and in whose hands soever that property may be found").

This historic principle was recently reaffirmed in *Caplin & Drysdale* v. *United States*, 491 U.S. 617, 627 (1989). In that case, the Court noted that the criminal drug forfeiture statute, 21 U.S.C. 853(c), "reflects the application of the long-recognized and lawful practice of vesting title to any forfeitable assets, in the United States, at the time of the criminal act giving rise to forfeiture." The Court went on to observe that it was neither "extraordinary [n]or novel" to conclude that the owner of property at the point that it becomes subject to forfeiture "cannot give good title to such property to [someone who acquires it from him] because he [does] not hold good title." 491 U.S. at 627.

B. No Party To Whom Forfeitable Assets Have Been Transferred Following Commission Of The Act Giving Rise To Forfeiture Under 21 U.S.C. 881(a)(6) Is Entitled To Assert An Innocent Owner Defense

1. The relation back doctrine applies to forfeitures under Section 881(a)(6)

As this Court made clear in *Henderson's Distilled Spirits*, 81 U.S. (14 Wall.) at 57, the relation back doctrine applies to federal statutes authorizing forfeiture unless the statute's language "show[s] a different intent." That interpretive rule comports with the broad principle that "[s]tatutes which invade the common law * * * are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." *Isbrandtsen Co.* v. *Johnson*, 343

U.S. 779, 783 (1952). See also *Astoria Federal Sav. & Loan Ass'n* v. *Solimino*, 111 S. Ct. 2166, 2169-2170 (1991); *Midlantic Nat'l Bank* v. *New Jersey Dep't of Env'tl Protection*, 474 U.S. 494, 501 (1986) ("The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific.").

When Section 881(a) was amended in 1978 by adding subsection (a)(6), see Psychotropic Substances Act of 1978, Pub. L. No. 95-633, § 301, 92 Stat. 3777, the statute did not explictly address the timing of forfeiture. Under the rule in *Henderson's Distilled Spirits*, therefore, the relation back doctrine applies with full force, and the government's claim to drug proceeds or assets used to facilitate a drug transaction under that section vests at forfeiture and cannot be compromised by any subsequent transfer.

As originally enacted in 1970, see Pub. L. No. 91-513, Tit. II, § 511, 84 Stat. 1276, Section 881(a) stated that "no property right shall exist" in items forfeited to the United States. In 1984, six years after Section 881(a)(6) was added to the statute, Congress enacted Section 881(h), which clarified the vesting of rights to property in the United States "upon commission of the act giving rise to forfeiture."[4] Section 881(h), in conjunction with the just-

[4] See Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 306, 98 Stat. 2050-2051. In the same enactment, Congress amended the Racketeer Influenced and Corrupt Organizations Act (RICO) (18 U.S.C. 1963) and the criminal forfeiture statute governing property involved in drug offenses (21 U.S.C. 853) to eliminate confusion over whether the relation back doctrine applies in criminal forfeiture proceedings. As the legislative history explains, Congress

quoted language of Section 881(a), makes clear that forfeitures under Section 881(a)(6) fall within the interpretive rule of *Stowell*: all private rights in property subject to forfeiture under that provision are automatically and irreversibly terminated by the acts giving rise to the forfeiture, and no one can subsequently acquire ownership of the property. Since subsequent transfers to other persons do not pass good title, an owner who has lost all of his interest in drug-related proceeds by reason of a forfeiture may not reverse or avoid the forfeiture and divest the United States of its "right, title, and interest" in the property, by the simple means of a purported conveyance to a new "owner." As codified in these statutory provisions, the principle of relation back leaves no room for the creation of an interest in drug proceeds by means of a later transfer.

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thought that the relation back doctrine, which it acknowledged to be the settled rule for civil forfeiture, should apply under the criminal forfeiture statutes:

> The problem of pre-conviction dispositions of property subject to criminal forfeiture is further complicated by the question of whether, simply by transferring an asset to a third party, a defendant may shield it from forfeiture. *In civil forfeitures, such transfers are voidable, for the property is considered "tainted" from the time of its prohibited use or acquisition.*

S. Rep. No. 225, 98th Cong., 2d Sess. 196 (1984) (emphasis added).

In simultaneously adding Section 881(h) to the civil forfeiture statute, Congress acknowledged that the relation back principle codified in Section 881(h) was already "well established" in the law and that it applied to civil forfeitures under Section 881(a). S. Rep. No. 225, *supra*, at 215. Perhaps to foreclose any negative implication from express incorporation of the relation back doctrine into the criminal forfeiture statutes, Congress codified the rule in the civil forfeiture statute as well.

2. Because the house claimed by respondent Goodwin was purchased with drug proceeds after those proceeds became the property of the United States, she is not an "owner" entitled to assert an "innocent owner" defense under Section 881(a)(6)

a. Section 881(a)(6) carves out a limited exception to the forfeiture of property falling within its scope for "innocent owners": specifically, it provides that no property shall be forfeited to the extent that the "owner" demonstrates that he neither knew of, nor consented to, the commission of the acts giving rise to forfeiture. Like the "innocent owner" exceptions created by identical language in Sections 881(a)(4) and 881(a)(7), the exception to forfeiture under subsection (a)(6) indisputably applies to individuals who owned the seized assets before those assets were ever tainted by involvement in drug transactions. Although a party who acquired a valid ownership interest before the event giving rise to forfeiture would ordinarily be divested of that interest once the triggering event took place, he is nonetheless entitled to contest forfeiture by demonstrating ignorance of the illegal transaction.

Section 881(a)(6), however, does not state that forfeited property may not be taken from any person who receives it without knowledge of its involvement in a drug crime. On the contrary, the statutory exception is expressly limited to the interests of innocent *owners*:

> no property shall be forfeited under this paragraph, *to the extent of the interest of an owner*, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

21 U.S.C. 881(a)(6) (emphasis added). A party to whom property is conveyed *after* it became subject to

forfeiture—at which point title to the property vested in the United States under 21 U.S.C. 881(h)—never possesses or acquires a valid ownership interest, because the relation back doctrine prevents the original owner from passing any valid interest to a third party. In the words of Section 881(h), "[a]ll right, title, and interest" in the property vested in the United States "upon commission of the act giving rise to forfeiture." Because the original owner previously lost any right or interest in the property, the new possessor is not an "owner" under the statute—innocent or otherwise—and cannot assert the innocent owner defense to forfeiture under Section 881(a)(6). See *In re One 1985 Nissan, 300ZX* [*Nissan*], 889 F.2d 1317 (4th Cir. 1989); *Eggleston* v. *Colorado*, 873 F.2d 242, 245-248 (10th Cir. 1989), cert. denied, 493 U.S. 1070 (1990).[5] Congress's choice of the word

[5] In *Nissan, supra*, the government sought civil forfeiture of more than $1,000,000 in cash and other drug proceeds found at the residence of Alvin White, a deceased drug dealer. The Fourth Circuit unanimously rejected the contention that the deceased's heirs were "innocent owners" within the meaning of 21 U.S.C. 881(a)(6). The court explained that, under the relation back doctrine, the dealer "could not have given good title to anyone while living, including his children," so he also could not pass any interest in the property after his death. The court added that "neither White's personal representative nor his children had any claim to any interest in White's property prior to the acts of White which gave rise to forfeiture, and for that reason the innocent owner provision of the statute provides no relief for them." 889 F.2d at 1321.

Similarly, in *Eggleston* v. *Colorado, supra*, the Tenth Circuit held that the State of Colorado was not an innocent owner of drug proceeds by virtue of sales tax liens that arose only after the offenses triggering the forfeiture of that property.

"owner" to designate the category of individuals eligible to avoid forfeiture under Section 881(a)(6) makes the defense unavailable to parties acquiring interests in property after the event triggering forfeiture.

b. The terms of the innocent owner defense in Section 881(a)(6) are consistent with application of the relation back doctrine to preclude assertion of the defense by those who claim an interest in the property that was acquired after forfeiture attaches. Section 881(a)(6) permits an owner to avoid forfeiture "by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner." By requiring the owner to prove that the acts giving rise to forfeiture took place without his knowledge or consent, the statute looks to the owner's state of mind *at the time the acts were committed.* However, the party acquiring tainted property through a transaction occurring after the events triggering forfeiture will not necessarily have been in a position to know of, or consent to, the illegal transactions from which the proceeds derive. Thus, if respondent is correct that the "innocent owner" defense is available to a party acquiring tainted property through a subsequent transfer, that party would be able to establish his innocence under the statute if he showed that he had

873 F.2d at 245-248. The court explained that "[t]he innocent owner exception applies only to owners whose interest vests prior to the date of the illegal act that forms the basis for the forfeiture." *Id.* at 248. The defense was not available where title to the drug proceeds in question "vested in the United States through forfeiture prior to any ownership interest held by the State." *Ibid.*

not previously encountered the offender and was unaware of the offense at the time it was committed, even if he later learned of the offense before acquiring the property. Logically, an act that is "committed * * * without the knowledge" of a person remains so even if he subsequently learns of its commission. With respect to a person who acquires property after the forfeitable offense, however, it makes no sense to permit that person to establish his innocence if he was ignorant of the offense when it occurred, but learned of it some time before receiving the property. By making contemporaneous knowledge or consent the only test of innocence, the statute would permit a drug dealer to circumvent forfeiture by conveying property to a friend or relative who was not a party to the illicit activity but became aware of it afterwards and knew that the purpose of the transfer was to defeat forfeiture.[6]

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[6] The district court in *United States* v. *One Parcel of Real Property*, 743 F. Supp. 103, 106 (D.R.I. 1990), made a similar point in rejecting the innocent ownership claim of a subsequent transferee of tainted real property under 21 U.S.C. 881(a)(7), which contains the same innocent owner exception:

> It is clear that the "knowledge or consent" test contained in § 881(a)(7) was intended to assess the "innocence" of a person who owned the premises at the time the offense was committed. Since such an owner presumably exercised some control over the property, it makes sense to determine forfeitability in terms of that owner's complicity or lack of complicity in the illegal activity.

The court further explained that "Congress could not have intended" that the innocence of subsequent transferees "be measured solely by the 'knowledge or consent' test." Rather, "[a] post delicto transfer of the property raises an additional issue bearing on the 'innocence' of the new owner, namely, whether that owner purchased the property in good faith."

A variation on the facts of this case illustrates the point that the test of innocence in Section 881(a)(6) cannot sensibly be applied to the category of persons claiming to have acquired ownership after the events giving rise to forfeiture. Suppose that Brenna bought the house with drug proceeds before he even knew Goodwin; that Goodwin later met him, learned of his illegal drug business, moved in with him, and acquired the house as a gift from Brenna. On those facts, the house would be subject to forfeiture by virtue of acts and omissions occurring before Goodwin knew Brenna —and, if Goodwin qualifies as an "owner," those acts and omissions would seem to have been "committed or omitted without the knowledge or consent of that owner." The way to avoid that obviously untenable result is to recognize, consistent with the relation back doctrine, that a person claiming an after-acquired interest in drug proceeds is not an "owner" whose knowledge or consent is relevant to the forfeitures mandated by Section 881(a)(6).[7]

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743 F. Supp. at 106. The court pointed out, *ibid.*, that Congress knew how to incorporate that more appropriate test for assessing the "innocence" of persons acquiring the property after forfeiture attaches: the criminal forfeiture statute, 21 U.S.C. 853(c), requires the new owner to "demonstrate that he *purchased* the property in good faith * * * and without knowledge or notice of the government's claim" (emphasis added). See pp. 30-35, *infra* (discussing criminal forfeiture statute).

[7] Of course, it might be possible to avoid this result by applying the common law principle that notice of a prior claim to property bars the transfer of good title even as to a bona fide purchaser for value. See, *e.g.*, Restatement of Restitution § 172 (1937) (bona fide purchaser takes good title to encumbered property if he is without notice of prior claims). On this theory, anyone who is aware at the

It is also unlikely that the statute's nonconsent requirement was meant to apply to an after-acquiror, since a person would not ordinarily have occasion to grant or withhold consent to an offense involving property before that person gained any interest in the property. It is even less likely that retroactive consent would be requested, given, or withheld at any time after the offense. Since Congress could not have intended the innocent owner defense to apply to circumstances in which the statutory test makes no meaningful distinction, it must be concluded that the defense does not apply to a person whose claim to ownership arises only after the commission of the offense that is the basis of forfeiture.

If the statute were intended to cover claimants receiving the property post-delicto, it naturally would have looked to the state of mind of the party seeking to block forfeiture at the time the forfeitable property changes hands and is acquired by the claimant. The most likely explanation for Section 881(a)(6)'s focus on the claimant's contemporaneous knowledge

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time of transfer that the property is, or was purchased with, drug proceeds could be excluded from the category of "owner" because, in the forfeiture context, knowledge of the "taint" would be tantamount to notice of the government's prior claim to the property.

But even if extra-statutory principles could be invoked to avoid the untenable consequences of applying the contemporaneous knowledge test to after-acquired property, it would still be difficult to explain why Congress would choose that test in this context, instead of focusing on the claimant's awareness of the "taint" at the point that the forfeitable property is acquired—as it did when it expressly provided for a defense of lack of knowledge at the time of purchase for subsequent transferees with respect to criminal forfeiture. See pp. 34-35, *infra*, and note 6, *supra*.

of the acts that are the basis of the forfeiture is that the "knowledge or consent" test was intended to assess the innocence of a person who owned the property at the time the offense was committed. That test is consistent with an innocent owner exception designed to restore ownership to a limited class of claimants who acquired ownership of the property prior to the acts giving rise to forfeiture and neither knew of nor consented to the illegal use of the property.[8]

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[8] In a concurring opinion in *Nissan*, 889 F.2d at 1322, Judge Murnaghan suggests that reading Section 881(a)(6) to bar assertion of the innocent owner defense by all subsequent transferees is "impossible to square" with providing for the forfeiture of "proceeds traceable to * * * an exchange" of controlled substances because it is not possible to "obtain drug deal proceeds before the transaction even takes place" (emphasis omitted). Judge Murnaghan goes astray in assuming that assets covered by Section 881(a)(6) can only be claimed under the innocent owner exception if those assets acquired their "taint"—and, thus, their character as "proceeds"—*before* the claimant acquired the interest that is the basis for asserting the defense. It is possible for funds to be entrusted to persons who subsequently use them to engage in drug transactions without the owner's knowledge or consent. For example, a sum of money might be turned over to a friend for investment on the promise of a large profit. If that money was "invested" in cocaine without the owner's permission, and the proceeds deposited in a bank account subsequently seized by the government, the investor would be entitled to assert an innocent owner defense to the forfeiture of the account to the extent of his original investment. Thus, contrary to Judge Murnaghan's conclusion, Section 881(a)(6) provides relief to an important class of property owners: nonparticipants in a drug transaction whose property is exchanged for drugs or otherwise used to facilitate the transaction.

c. The court of appeals in this case recognized that the "innocent owner" defense creates an exception to the relation back doctrine, but read the exception far too broadly by wholly suspending the doctrine before determining the scope of the exception. The court noted that "Section 881(h) vests title in the United States *in that property described in subsection (a)*," Pet. App. 8a, and reasoned that property "described in [that] subsection" does *not* include property that subsection (a) excepts from forfeiture in the innocent owner proviso. In effect, the court decided "first [to] ascertain whether the property at issue is not forfeitable because of an innocent owner defense" and only then to "apply[] section 881(h)." *Id.* at 8a-9a. On the court's reading, Section 881(h) never reaches property that is later acquired by an individual innocent of the acts giving rise to forfeiture, and title to that property never vests in the United States.

The Third Circuit's reading of the statute is not a natural one. The innocent owner defense in Section 881(a)(6) does not provide—as the court of appeals would have it—that property covered by the defense is somehow not "property described in subsection (a)." On the contrary, property covered by the defense plainly *is* included in "property described in subsection (a)": subsection (a)(6) speaks of "*all* * * * things of value" exchanged for a controlled substance, and "*all* proceeds traceable to such an exchange." The subsection then goes on to provide that such property shall nonetheless be exempt from forfeiture if the owner can demonstrate innocence.

Furthermore, if the property covered by the innocent owner defense were not "property described in subsection (a)" in the first instance, there would of

course be no need to specify that, if the prerequisites to assertion of the defense are satisfied, the property shall not be forfeited. The relation back doctrine in Section 881(h), by its terms, covers all "property described in subsection (a)," including property so described that is nonetheless exempted from forfeiture because of the innocent owner defense. In concluding otherwise, the Third Circuit, in effect, read Section 881(h) as if it referred to "property subject to forfeiture under subsection (a)" rather than "property described in subsection (a)."

The court's analysis also ignores the timing of Section 881(h)'s application. Section 881(h) operates on the "property described in subsection (a)" at the time that property acquires its "taint"—not at the time it is later conveyed to a third party. At the time that Section 881(h) operates to vest title in the United States, a person in respondent Goodwin's position has not even acquired the interest that would be the basis for asserting the innocent owner defense in a later adjudication of forfeiture. The point of Section 881(h) is that it prevents the acquisition of a valid ownership interest that would be the basis for asserting such a defense by vesting title in the United States and precluding that title from passing to any third party.[9]

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[9] For example, in this case, the government has established probable cause to believe that the money Brenna transferred to Goodwin was derived from drug dealing. If it was, that money was, at the point of Brenna's unlawful acts, "property described in" Section 881(a), and the United States acquired "all right, title, and interest" to it. Under the Third Circuit's view, however, the very same property would cease to be "property described in" Section 881(a) at the moment that it was transferred to someone without knowledge of Brenna's illegal activities, and the title previously conferred on the

In sum, the Third Circuit's analysis completely nullifies the purpose and effect of Section 881(h): to grant broad title to the United States at the point when property is involved in an illegal drug transaction, and to make clear that *no* subsequent transfers can ever pass good title. Under the Third Circuit's construction, however, property on which Section 881(h) has already operated can be pulled outside the statute retroactively by a transfer to an innocent third party. The upshot is that what is in plain statutory language an unqualified grant of "all right, title, and interest" to drug proceeds at the point of a drug offense is nullified, retroactively, thereby effectively stripping that provision of its meaning. That interpretation does not represent a plausible accommodation of the innocent owner defense and the relation back provision. Cf. *American Paper Institute, Inc.* v. *American Electric Power Service Corp.*, 461 U.S. 402, 421 (1983) (statutes should not be construed so as to impute to Congress "a purpose to paralyze with one hand what it sought to promote with the other").

d. This construction of the innocent owner defense in Section 881(a)(6) is buttressed by the fact that Congress used very different words in other forfeiture statutes to create an exemption for property acquired by innocent third parties *after* the events leading to forfeiture. In 1984, six years after Section

United States would be revoked. If the property were returned to Brenna at a later point, the Third Circuit would presumably hold that the property was again subject to the relation back provision and that the government's title had been restored. A statute that on its face grants unqualified title to specified property at a given point in time cannot reasonably be construed to embody such an in-again, out-again conception of ownership.

881(a)(6) was added to the civil forfeiture statute, Congress revised the criminal forfeiture statute by enacting 21 U.S.C. 853, which provides for forfeitures of drug-related assets on the basis of criminal convictions. See Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 303, 98 Stat. 2044-2049 (§ 413); *United States* v. *Monsanto*, 491 U.S. 600 (1989); *Caplin & Drysdale* v. *United States*, *supra*; see also note 4, *supra*. To resolve uncertainty over whether the relation back doctrine—which originated in the civil context—would carry over to criminal forfeitures, see S. Rep. No. 225, 98th Cong., 2d Sess. 196 (1984); note 4, *supra*, Congress included a relation back provision in the criminal forfeiture statute, 21 U.S.C. 853(c).[10] That provision

[10] Section 853(c) provides:

> All right, title, and interest in property described in subsection (a) of this section vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (n) of this section that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

The language of Section 853(c) is identical to the criminal forfeiture provision of RICO, see 18 U.S.C. 1963(c), which was also enacted as part of the Comprehensive Crime Control Act of 1984. See S. Rep. No. 225, *supra*, at 200-201.

Section 853(n)(6) of the criminal forfeiture statute, which deals with third-party interests in property subject to forfeiture, expressly distinguishes, in subsections (6)(A) and (6)(B), between parties with a "legal right, title, or interest" superior to that of the defendant "at the time of the commission of the acts which gave rise to the forfeiture"—a group that would correspond to "owners" under the civil forfeiture

explicitly recognized that property "transferred to a person other than the defendant" after the illegal act occurred was also subject to forfeiture, but nonetheless permitted a transferee to avoid forfeiture if he could establish that he was a bona fide purchaser for value and that, "at the time of purchase," he was "reasonably without cause to believe that the property was subject to forfeiture."

The contrast between this provision and Section 881(a)(6) is revealing. First, in permitting some after-acquirors to block forfeitures under Section 853(c), Congress chose *not* to designate that group as "owners," implicitly recognizing that, if "[a]ll right, title, and interest * * * vests in the United States upon the commission of the act giving rise to forfeiture," subsequent acquirors cannot fall into that category. Rather, since such after-acquired property belongs to the United States, Congress used the term "transferee" to designate the class of subsequent bona fide purchasers entitled to claim the property.[11]

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statute—and parties claiming the property as bona fide purchasers without notice who acquire the property after the "commission of the [unlawful] acts," as described in the "transferee" exception in 853(c). The absence of a requirement in the criminal forfeiture statute that a claimant in the "owner" category prove innocence can be explained by the *in personam* nature of criminal forfeiture proceedings. See note 11, *infra*.

[11] The court of appeals apparently assumed (Pet. App. 6a-9a) that Congress must have intended the exception for innocent owners in Section 881 to extend at least as far as the exception for bona fide purchasers in Section 853. Whether by oversight or design, however, the civil relation back provision, 21 U.S.C. 881(h), does not explicitly exempt any class of subsequent transferees of forfeited property.

While Congress did not directly explain why it added express protection for some transferees to one statute but not

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the other, fundamental differences between civil and criminal forfeiture suggest a possible explanation. Because criminal forfeitures are relatively new in federal law and are imposed through an *in personam* procedure as a form of punishment against a person convicted of a crime, the exception for bona fide purchasers in Section 853 was probably intended to ensure that this criminal sanction visits hardship on the convicted defendant and not others unlikely to be involved in the offense or in sheltering the defendant's property. See S. Rep. No. 225, *supra*, at 208 ("Criminal forfeiture is an *in personam* proceeding * * * reach[ing] only property of the defendant, save in those instances where a transfer to a third party is voidable."). That rationale does not necessarily apply to civil forfeitures, which have always regarded the property as the "offender." Such forfeitures have for centuries proceeded through actions *in rem* that take no account of the conduct of the owner. See pp. 15-18, *supra*; see also 1 D. Smith, *Prosecution and Defense of Forfeiture Cases* ¶¶ 2.01-2.04 (1991) (civil forfeitures *in rem*); 2 *id.* at ¶ 13.01 (criminal forfeitures *in personam*).

Whatever the explanation for the different language in the criminal and civil statutes, the fact that the 1984 Congress failed to include an express exception for transferees in the civil context does not show that six years earlier Congress intended to exempt *all* innocent transferees—including recipients of gifts like respondent—from civil foreitures. Likewise, there is no indication that the 1984 Congress intended to exempt from civil forfeiture property—such as gifts to third parties—that was clearly subject to criminal forfeiture. To the contrary, the 1984 committee report expresses the view that all transfers of "tainted" property by drug offenders were "voidable" in civil forfeiture proceedings and indicates that Section 853(c) was intended to produce the same result in the criminal context, with an exception for bona fide purchasers. See S. Rep. No. 225, *supra*, at 196, 200-201, 211-212. (As discussed below, at pp. 35-41, the possibility that property that is exempt from criminal forfeiture by virtue of a transfer to a bona fide purchaser will be subjected to civil forfeiture is more hypothetical than real.)

The facts of this case also illustrate why it is important that civil forfeitures be available even for property that is

Second, in contrast with Section 881(a)(6), the test of "innocence" under Section 853(c) is whether the purchaser had reason to believe that the property was subject to forfeiture *at the time of purchase.* As already explained, this is the criterion that Congress would be expected to adopt for persons acquiring their interest in property after the events giving rise to forfeiture, because those persons may not learn of the tainted source of the assets until sometime after the events occurred. However, Section 881(a)(6) focuses on the owner's awareness of the acts giving rise to forfeiture at the time the acts were committed—a state of mind that, as a practical matter, may be independent of a subsequent transferee's guilty knowledge of the tainted character of the property.

In short, the language employed by Congress in Section 881(a)(6) does not accomplish the purpose later effected in Section 853(c): to provide protection for subsequent "innocent" transferees of forfeitable assets. Congress did not use the word "transferee" or any equivalent expression in Section 881(a)(6), nor did it expressly furnish a broader definition of

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subject to criminal forfeiture. Until recently, Brenna was a fugitive and could not be tried. Likewise, if a criminal defendant dies, any prosecution against him abates, and civil proceedings may be the only remaining means of enforcing a forfeiture of drug proceeds belonging to the deceased offender. See *United States* v. *Oberlin*, 718 F.2d 894, 896 (9th Cir. 1983); but see *United States* v. *Mollica*, 849 F.2d 723, 726 (2d Cir. 1988) (refusing to decide whether criminal forfeiture abates with death). In some cases, civil forfeitures also enable the government to establish title to drug-related assets without awaiting the completion of criminal proceedings.

the term "owner" than would properly apply in a statute incorporating the relation back doctrine. Instead, Congress used the "innocent owner" language that also appears in Sections 881(a)(7) and 881(a)(4), under which the exception is "most commonly claimed by someone who allows a third party to use their automobile, boat, aircraft or real property, only to 'discover' that the third party has used their property to facilitate an illegal drug transaction." *United States* v. *One Single Family Residence*, 683 F. Supp. 783, 786 (S.D. Fla. 1988). It is reasonable to infer that Congress intended the parallel exception under Section 881(a)(6) to be claimed by owners of property in an analogous situation, not by parties acquiring property after forfeiture attaches.[12]

C. A Person Acquiring Property Purchased With Drug Proceeds May Seek Equitable Remission Of Forfeiture Under Section 881(d)

The court of appeals in this case took as its starting point the district court's ruling that bona fide purchasers of assets subject to forfeiture are entitled to

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[12] Respondent seeks to undermine the government's reading of Section 881(a)(6) by relying on remarks made on the floor of both houses of Congress by sponsors of the amendment that became Section 881(a)(6). Br. in Opp. 2-3; see also Pet. App. 7a (citing Joint Explanatory Statement accompanying enactment of the Psychotropic Substances Act of 1978, *supra*, for the proposition that the term "owner" should be construed "broadly"). Even if the floor debates might suggest that some legislators were of the opinion that the new provision proposed for enactment would protect some individuals acquiring drug proceeds after the forfeiture took effect, the words that Congress actually incorporated into the statute plainly belie that impression. In such circumstances, the words of the statute must control.

seek shelter as innocent owners under Section 881 (a)(6). In concluding that Congress intended the exception to reach all "owners" regardless of how the property was acquired, the court of appeals appears to have been swayed by concern that denying innocent owner status to the recipient of a gift would necessarily deny innocent owner status to bona fide purchasers as well. Pet. App. 9a.[13]

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[13] Relying in part on legislative history, some courts have suggested that the innocent owner defense is at least available to bona fide purchasers for value of property that has previously been involved in drug transactions. See *United States* v. *One Single Family Residence Located at 6960 Miraflores Ave.*, 731 F. Supp. 1563, 1568 (S.D. Fla. 1990), appeal dismissed, 932 F.2d 1433 (11th Cir. 1991), cert. granted on other issues *sub nom. United States* v. *Republic Nat'l Bank*, No. 91-767 (Feb. 24, 1992); *United States* v. *One Single Family Residence*, 683 F. Supp. at 787-788; see also *Nissan*, 889 F.2d at 1322 (Murnaghan, J., concurring). Concern for bona fide purchasers, however, would not support an exception for *all* after-acquired interests in drug-related property. Permitting recipients of gifts of drug proceeds to assert innocent ownership would undercut the statute to a far greater extent than an exception for bona fide purchasers. Drug traffickers could shelter their assets by giving them to friends and relatives while still retaining some degree of enjoyment and control. See pp. 42, *infra*. This case is a good example: Brenna lived in the house he gave to his companion, Goodwin, for five years. Also, in contrast with donations, genuine arm's-length transactions often generate "derivative proceeds"—the property the drug dealer receives in exchange for the drug proceeds—that are available for forfeiture to the government. This case concerns only the recipient of a gift of drug proceeds. It is therefore unnecessary for the Court to decide in this case whether a bona fide purchaser of property representing drug proceeds could seek to block a forfeiture under Section 881(a)(6).

The court of appeals' concerns are greatly overstated. As this Court has previously observed, the harshness of statutory forfeiture has traditionally been tempered through administrative procedures for remission and mitigation: "Since 1790 the Federal Government has applied the ameliorative policy * * * of providing administrative remissions and mitigations of statutory forfeitures in most cases where the violations are incurred 'without willful negligence' or an intent to commit the offense." *Calero-Toledo*, 416 U.S. at 689-690 n.27. In keeping with this policy, Section 881(d) grants the Attorney General discretion to remit civil forfeitures of drug related assets by incorporating by reference the provision for equitable remission and mitigation of forfeitures under the customs laws, codified at 19 U.S.C. 1618.[14] The

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[14] Section 1618 states, in pertinent part:

> Whenever any person interested in any [item] seized under the provisions of this chapter * * * files * * * a petition for the remission or mitigation of such * * * forfeiture, the * * * Commissioner of Customs, if he finds that such * * * forfeiture was incurred without willful negligence or without any intention on the part of the petitioner to defraud the revenue or to violate the law, or finds the existence of such mitigating circumstances as to justify the remission or mitigation of such * * * forfeiture, may remit or mitigate the same upon such terms and conditions as he deems reasonable and just, or order discontinuance of any prosecution relating thereto.

Section 881(d) provides that the duties imposed on customs officers under the customs provisions incorporated by reference "shall be performed with respect to seizures and forfeitures of property under this subchapter" by persons designated by the Attorney General. In the case of forfeitures under Section 881(a), these responsibilities are delegated to the Director of the Asset Forfeiture Office of the Criminal Division of the Department of Justice. See 28 C.F.R. 9.3(d).

remission procedure is available in lieu of (or, in appropriate cases, in addition to) claims for judicial remission, and can be invoked either before or after the adjudication of forfeiture. Compare 21 C.F.R. 1316.76, 1316.78 (judicial forfeiture) and 21 C.F.R. 1316.79 (authorizing petition for remission of judicial forfeiture to the Attorney General); see also *United States* v. *Wood*, 851 F.2d 185, 188 (8th Cir. 1988) (reviewing "two avenues" for relief from forfeiture); 2 D. Smith, *Prosecution and Defense of Forfeiture Cases* ¶ 15.02 (1991) (reviewing equitable remission and mitigation procedures). In addition, money from the Assets Forfeiture Fund is available to compromise and pay valid liens and mortgages on forfeited property and to make payments to innocent persons in connection with the remission and mitigation of forfeitures. 28 U.S.C. 524(c)(1)(D) and (E); see S. Rep. No. 225, *supra*, at 217.

By the terms of the statute authorizing remissions, see 19 U.S.C. 1618, "any person interested" in seized or forfeited property is eligible to petition the Attorney General for return of the property. See also 21 C.F.R. 1316.79 (authorizing petition for remission by "[a]ny person interested in any property which has been seized, or forfeited * * * by court proceedings"). That designation is far broader than the category of "owner" entitled to assert the Section 881(a)(6) innocent owner defense. Accordingly, the regulations promulgated to implement the equitable remission authority permit the Attorney General to remit a forfeiture on the strength of a showing that the petitioner "has a valid, good faith interest in the seized property as owner *or otherwise*," 28 C.F.R. 9.5(b)(1) (emphasis added).

The remission regulations are primarily designed to ensure that innocent bona fide purchasers for

value—that is, persons who purchase tainted assets through the ordinary course of business, without any reasonable means of knowing of the transferor's illegal activities or the government's prior claim—can reclaim property seized by the government under the civil forfeiture laws. The regulations establish a simple and informal administrative procedure that relieves eligible claimants of the burden and expense of participating in judicial forfeiture proceedings.[15] The regulations make special provision for general creditors, lienholders, lessors, and other holders of bona fide interests in seized property. See 28 C.F.R. 9.6. Moreover, the government has recently established a policy of expedited forfeiture settlement for mortgage holders. See United States Dep't of Justice, *Expedited Forfeiture Settlement Policy for Mortgage Holders* (July 1991). In keeping with the policy underlying those provisions, federal law enforcement authorities do not, as a matter of practice, pursue forfeiture of property in the hands of bona fide purchasers for value who would ordinarily be expected to lack notice of the government's prior claim.[16]

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[15] The regulations additionally provide that, to qualify for remission, the petitioner must show (1) that he lacked knowledge that the property at issue "was or would be involved in any violation of the law," (2) was unaware of the particular violation giving rise to the forfeiture, (3) took "all reasonable steps to prevent the illegal use of the property," and (4) did not know that the user of the property had any record of violating the law. 28 C.F.R. 9.5(b). Even if a petitioner cannot satisfy these criteria, mitigation of forfeiture may be granted for "extenuating circumstances," or to "avoid extreme hardship." 28 C.F.R. 9.5(c).

[16] It has been suggested that, if the innocent owner exception of Section 881(a)(6) is construed not to cover property acquired after it is subject to forfeiture, it might be unconstitutional under *Calero-Toledo* v. *Pearson Yacht Leasing Co.*,

The category of persons eligible to apply for remission is not limited to bona fide purchasers or to

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supra. See, *e.g.*, *United States* v. *One Single Family Residence Located at 6960 Miraflores Ave.*, 731 F. Supp. at 1569. In *Calero-Toledo*, 416 U.S. at 689-690, the Court stated in dictum that

> it would be difficult to reject the constitutional claim of * * * an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property: for in that circumstance, it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive.

This dictum, by its terms, is concerned with the situation covered by the innocent owner defense as we construe it—where "an owner"—*i.e.*, one whose interest antedates the illegal use resulting in forfeiture—does all that could be expected "to prevent the proscribed use of his property." Even assuming that this dictum were relevant in the circumstances of this case, however, there would be no need to reject the government's interpretation of the innocent owner defense in Section 881(a)(6) to avoid an unconstitutional result. In assessing whether a claimant has been deprived of his constitutional rights under the forfeiture statute, Section 881(a)(6) cannot be considered in isolation. Rather, a claimant must first avail himself of all available procedures for the return of his property before it can be determined whether he has been deprived of the property in an unconstitutional manner. See, *e.g.*, *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 190-191 (1985); *MacDonald, Sommer & Frates* v. *County of Yolo*, 477 U.S. 340, 348 (1986). Thus, even if a claimant satisfying the *Calero-Toledo* criteria would be ineligible for relief from forfeiture under Section 881(a)(6), that provision would not be invalid if relief were available under the procedures for remission authorized by Section 881(d). In fact, the criteria established by the Attorney General for equitable remission in regulations implementing that section precisely track the *Calero-Toledo* requirements.

"owners" as that term is used in Section 881(a), so a person in respondent Goodwin's position would also be eligible to invoke the procedure for equitable remission.[17] Thus, a holding that the legal innocent owner defense to judicial forfeiture in Section 881(a)(6) is unavailable to persons receiving gifts of drug proceeds would not deprive those persons of all opportunity to attempt to regain forfeited property by proving their innocence of the drug transactions from which the property derives. Rather, it would simply require those persons to avail themselves of procedures that are authorized under a different statutory section.

D. Extending The Innocent Owner Defense To Recipients Of Gifts Of Drug Proceeds Would Undermine The Effectiveness Of Civil Forfeitures In The Enforcement Of Federal Drug Laws

Congress has made clear that forfeitures play an essential role in efforts to eradicate drug trafficking. The reasoning underlying the overhaul of drug forfeiture statutes in 1984, see S. Rep. No. 225, *supra*, at 191, is no less compelling today:

> Today, few in the Congress or the law enforcement community fail to recognize that the traditional criminal sanctions of fine and impris-

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[17] In addition to filing a claim in district court to defend against judicial forfeiture of the property at issue in this case, see J.A. 22-23, respondent Goodwin filed a petition for remission and mitigation of judicial forfeiture, J.A. 31-33, which received consideration by the Asset Forfeiture Office under the regulations implementing Section 881(d). The Asset Forfeiture Office informs us that the petition was denied by the Director on October 4, 1991, on the ground that respondent Goodwin had not satisfactorily established that she lacked knowledge that the property was or would be involved in any violation of the law.

> onment are inadequate to deter or punish the enormously profitable trade in dangerous drugs which, with its inevitable attendant violence, is plaguing the country. Clearly, if law enforcement efforts to combat racketeering and drug trafficking are to be successful, they must include an attack on the economic aspects of these crimes. Forfeiture is the mechanism through which such an attack may be made.

The Third Circuit's decision, unless reversed, will undercut the effectiveness of that critical remedy by enabling drug dealers to realize benefits from their illegal activity.[18] The principal purpose of the forfeiture laws is to strip those who engage in drug trafficking of their "undeserved economic power." *Caplin & Drysdale*, 491 U.S. at 630. Money has value to a drug dealer, like anyone else, in part because it can be given away. Even if courts could reliably limit the innocent owner defense to donees who were in fact ignorant of the source of their gifts, the Third Circuit's interpretation would allow drug dealers to distribute their wealth to minor children, other unknowing family members, companions, and others with whom they seek to curry favor. Following Brenna's lead, they could even enjoy the use of very valuable property that they have given to their most intimate companions.

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[18] Moreover, this Court has acknowledged that the government has a "pecuniary interest in forfeiture that goes beyond merely separating a criminal from his ill-gotten gains." *Caplin & Drysdale*, 491 U.S. at 629. This interest "extends to recovering *all* forfeitable assets, for such assets are deposited in [the Department of Justice Assets Forfeiture] Fund[,]" which supports law-enforcement efforts "in a variety of important and useful ways." *Ibid.* See 28 U.S.C. 524(c).

Furthermore, the Third Circuit's interpretation will encourage drug dealers to use nominees to conceal their assets. It is not difficult for even close friends or relatives of a drug trafficker to contend, as Goodwin does here, that they were unknowing recipients of gifts of drug proceeds—and it is difficult to assemble evidence rebutting such a claim. By placing title to drug proceeds in another person, therefore, a drug trafficker can erect a serious obstacle in the way of the government's efforts to obtain forfeiture of assets that are demonstrably traceable to drug transactions.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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MAY 1992

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(4)

No. 91-781

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

A PARCEL OF LAND, BUILDINGS, APPURTENANCES AND IMPROVEMENTS KNOWN AS 92 BUENA VISTA AVENUE, RUMSON, NEW JERSEY, AND BETH ANN GOODWIN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED NOVEMBER 12, 1991
CERTIORARI GRANTED MARCH 2, 1992

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

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* The opinions of the court of appeals and district court are printed in the appendix to the petition and have not been reproduced here.

UNITED STATES DISTRICT COURT
D. NEW JERSEY

Civ. A. No. 89-1411

UNITED STATES OF AMERICA, PLAINTIFF

v.

A PARCEL OF LAND, BUILDINGS, APPURTENANCES AND IMPROVEMENTS KNOWN AS 92 BUENA VISTA AVENUE, RUMSON, NEW JERSEY, DEFENDANT

RELEVANT DOCKET ENTRIES

DATE	NR	PROCEEDINGS
4-6-89	1	Complaint filed 4-3-89.
4-6-89	2	Notice of Lis Pendens filed 4-3-89
4-6-89		Summons & Warrant for Arrest issued on 4-5-89. (20 days) (Mailed to U.S. Attorney)
4-6-89	3	Notice of allocation & assignment filed 4-5-89. (Newark-Ackerman)
4-19-89	—	Warrant of seizure issued. (sent to US Attorney)
5-1-89	4	Notice of pltf. of filing forfeiture complt. w/return of summons & warrant for arrest, fld. 4-24-89.
5-5-89	5	Claim and applicaton of Beth Ann Goodwin for permission to defend this action, fld. 5-1-89.

DATE	NR	PROCEEDINGS
5-9-89	6	Consent order permitting claimant Beth Ann Goodwin to file responsive pleading on or before 6-15-89 fld. 6-7-89. (Ackerman) N/M
5-13-89	7	Order re discovery and scheduling status conference on 7-27-89 fld. (Chesler) N/M
6-15-89	8	Order re discovery fld. (Chesler) N/M
6-19-89	9	*Answer* of claimant Beth Ann Goodwin and *counterclaim* fld. 6-15-89.
6-19-89	10	Summons and warrant for arrest w/USM process receipt and return of svc. of complt. and warrant on deft. and claimant on 4-21-89 fld. 6-5-89.
7-6-89	11	*Reply* of pltf. to counterclaim fld. 6-28-89.
7-6-89	12	Claimant Beth Ann Goodwin demand for *jury* w/cert. of svc. attached fld. 7-3-89.
8-3-89	13	Consent order re discover fld. 7-28-89. (Chesler) N/M
9-5-89	14	Notice of motion of claimant Beth Ann Goodwin to dismiss compit and seizure or in the alternative summary judgment and/or ordering pltf. to produce documents and witnesses requested and answer interrogatories ret. 9-25-89; 12G statement and cert. of svc. fld. 9-1-89. (brief sub.)
9-5-89	15	Affidavit of James A. Plaisted fld. 9-1-89.

DATE	NR	PROCEEDINGS
10-12-89	16	Notice of cross motion of pltf. for stay pending ongoing criminal investigation ret. 11-13-89 and cert. of svc. fld. 10-5-89. (brief sub.)
10-12-89	17	Affidavit of Neil R. Gallagher, Esq. fld. 10-5-89.
10-13-89	18	Supplemental affidavit of James A. Plaisted fld. (reply brief sub.)
5-7-90	19	Affidavit of Neil R. Gallagher, with certificate of service, fld. 5-4-90 (reply brief sub.)
5-30-90	20	Minutes of Proceedings of 5-29-90, fld. 5-29-90 (Ackerman) Hearing on motion of pltf. for stay pending ongoing criminal investigation. Opinion read into record. Ordered motion granted. Order to be submitted.
6-4-90	21	Opinion, fld. 6-1-90 (Ackerman)
6-25-90	22	Affidavit of James A. Plaisted with certificate of service, fld.
7-13-90	23	Opinion on request for certification to appeal, fld. 7-13-90.
7-13-90	24	Order denying claimant's motions to dismiss the complaint and for summary judgment, granting pltf's motion for stay pending trial in the U.S. District Court Southern District of Florida and granting the claimant's application to certify for appeal, fld. 7-13-90 (Ackerman) n/m
7-13-90	25	*Transcript* of Proceedings of 5-29-90, fld. 7-9-90 (Ackerman)
7-16-90	–	Case closed (al) [Entry date 07/31/90]

DATE	NR	PROCEEDINGS
8-7-90	26	ORDER vacating the order of 7-13-90, denying claimant's motions to dismiss the complaint for summary judgment, granting pltf's motion for a stay pending trial in the U.S. District Court Southern District of Florida and granting claimant's application to certify for appeal, etc., fld. 8-7-90 (signed by Judge Harold A. Ackerman) (al) [Entry date 08/28/90]
8-15-90	26	Order vacating the order of 7-13-90, denying claimant's motions to dismiss the complaint for summary judgment, granting pltf's motion for a stay pending trial in the U.S.D.C. Southern District of Florida and granting claimant's application to certify for appeal, etc., fld. 8-7-90 (Ackerman) n/m
8-17-90	–	CLERK'S NOTE: ALL SUBSEQUENT ENTRIES ARE ON ICMS.
8-17-90	–	Case reopened (al) [Entry date 08/28/90]
8-17-90	–	CLERK'S NOTE: All future entries on computer. (nh) [Entry date 09/24/90]
9-17-90	27	CERTIFIED COPY OF USCA ORDER granting Beth Ann Goodwin leave to appeal interlocutory order of 8-15-90. (USCA Misc. 90-8084) (pv) [Entry date 09/25/90] [Edit date 09/28/90]
9-25-90	–	Copies of notice of appeal sent to USCA & Jerome Merin, AUSA (pv)

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

No. 90-5823

UNITED STATES OF AMERICA

v.

A PARCEL OF LAND, BUILDINGS, APPURTENANCES AND IMPROVEMENTS, KNOWN AS 92 BUENA VISTA AVENUE, RUMSON, NEW JERSEY, AND BETH ANN GOODWIN, CLAIMANT

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
9/28/90	CIVIL CASE DOCKETED. Notice filed by Beth Ann Goodwin. (Case Transferred from Misc. No. 90-8084) (lld)
10/9/90	APPEARANCE from Attorney Neil R. Gallagher on behalf of Appellee USA, filed. (lld)
10/11/90	APPEARANCE from Attorney James A. Plaisted on behalf of Appellant Beth Ann Goodwin, filed. (lld)
10/11/90	DISCLOSURE STATEMENT on behalf of Appellant Beth Ann Goodwin, filed. (lld)
10/11/90	INFORMATION STATEMENT on behalf of Appellant Beth Ann Goodwin, RECEIVED. (lld)

DATE	PROCEEDINGS
10/31/90	TRANSCRIPT (Clk), already on file in the District Court Clerk's Office. (mgd)
10/31/90	BRIEFING NOTICE ISSUED. Appellant brief and appendix due 12/10/90. (lld)
12/10/90	MOTION filed by Appellant Beth Ann Goodwin for extension of time to file brief and appendix until 12/31/90. Certificate of Service dated 12/8/90. (dlr)
12/11/90	ORDER (Clerk) Denying motion by Appellant for extension of time to file brief and appendix. Counsel has previously been advised that strict compliance with this Court's briefing schedules was expected. Counsel's decision to attend to other matters does not constitute good cause to justify an extension in this Court. Rule 26(b), Fed. R. App. P. Appellant's brief and the joint appendix will be received for the information of the Court if submitted and served by December 19, 1990. If timely submission and service does not occur by that date, the appeal will be dismissed without further notice. Court Rule 28(2), filed. (dlr)
12/19/90	MOTION filed by Appellant Beth Ann Goodwin to reconsider order dated 12/11/90 to file brief and appendix out of time. Certificate of Service dated 12/19/90. (dlr)
12/19/90	BRIEF on behalf of Appellant Beth Ann Goodwin, Pages: 39, Copies: 10, delivered by mail, received. Certificate of service date 12/19/90. [see 12/11/90 order]. (mtl)

DATE	PROCEEDINGS
12/19/90	APPENDIX on behalf of Appellant Beth Ann Goodwin, Copies: 10 Volumes: 2, Delivered by mail, received. Certificate of service date 12/19/90. [see 12/11/90 order]. (mtl)
12/20/90	ORDER (Clerk) granting motions by Petitioner in 90-3605 and by Appellant in 90-5823 to reconsider orders. The prior orders will not be modified. It appears that from the above submission that there is a pattern of disregard for this Court's scheduling orders by the members of the firm of Walder, Sondak, Berkeley and Brogan, P.A. Whether such pattern exists or not, Counsel's decision to attend to other professional commitments after having received notice that strict compliance this Court's briefing orders was expected does not constitute good cause shown pursuant to Rule 26(b), Fed. R. App. P., to justify the filing of the briefs and appendices out of time. It is noted that in both cases Counsel failed even to submit timely motions. If counsel wishes this Court to consider their appeals, they must be prepared to prosecute them in the manner provided by the Court, filed. (Cvs. 90-3605 and 90-5823) (dlr)
1/15/91	CERTIFIED LIST filed. (mgd)
1/22/91	BRIEF on behalf of Appellee USA, Pages: 32, Copies: 10, Delivered by mail, filed. Certificate of Service date 1/22/91. (mtl)
1/28/91	CALENDARED for Tuesday, April 2, 1991. (agb)

DATE	PROCEEDINGS
2/5/91	REPLY BRIEF on behalf of Appellant Beth Ann Goodwin, Copies: 10, Delivered by mail, filed. Certificate of service date 2/5/91. (mtl)
4/2/91	ARGUED 4/2/91 Panel: Mansmann, Hutchinson, Circuit Judges, O'Neill, District Judge. (agb)
6/17/91	OPINION (*Mansmann* and Hutchinson, Circuit Judges, and O'Neill, District Judge), filed. (ch)
6/17/91	JUDGMENT, REMANDED to the said District Court with direction to reconsider Beth Ann Goodwin's motion for summary judgment and motion to dismiss after determining whether Goodwin was an "innocent owner." It is further ordered and adjudged that as to all other certified issues, the decision of the said District Court is affirmed, filed. (ch)
6/25/91	MOTION filed by Appellee USA for a thirty day extension of time to file petition for rehearing. Certificate of Service dated 6/24/91. (ch)
7/1/91	LETTER OBJECTION by Appellant Beth Ann Goodwin to motion for extension of time to file petition for rehearing, filed. Certificate of service dated 6/28/91. (ch)
7/11/91	ORDER filed (*Mansmann,* Circuit Judge) granting motion for extension of time to and including July 31, 1991 within which to file petition for rehearing by Appellee USA. (kot)
7/30/91	PETITION by Appellee USA for rehearing in banc, filed. Certificate of service dated 7/29/91. (ch)

DATE	PROCEEDINGS
8/13/91	ORDER filed (Sloviter, Chief Judge, Becker, Stapleton, *Mansmann,* Authoring Judge, Greenberg, Hutchinson, Scirica, Cowen, Nygaard, Roth, Circuit Judges, and O'Neill, District Judge) denying petition for in banc rehearing. Judges Becker, Stapleton, Cowen and Roth would have granted rehearing. (ch)
8/19/91	MOTION filed by Appellee USA to stay mandate. Certificate of Service dated 8/16/91. (kot)
9/3/91	REPORTER at 937 F2d: 98 (ch)
9/4/91	ORDER filed (Mansmann, Circuit Judge) granting motion to stay mandate by Appellee USA. Mandate Stayed to 9/23/91 (ch)
9/20/91	MOTION filed by U.S.A., Appellee to further stay mandate. Certificate of Service dated 9/19/91. (ch)
10/8/91	ORDER filed (Mansmann, Authoring Judge) granting motion to stay mandate by Appellee USA. Mandate Stayed to 10/23/91 (ch)
10/24/91	MANDATE ISSUED, filed. (ch)
10/24/91	RECORD released. (ch)
11/18/91	Supreme Court of U.S. notice filed advising petition for writ of certiorari filed by Appellee USA. Filed in the Supreme Court on October 12, 1991 at Supreme Ct. case number: 91-781. (ch)
1/2/92	Supreme Court of U.S. notice filed advising petition for writ of certiorari filed by Appellant Beth Ann Goodwin. Filed in the Supreme Court on December 16, 1991 at Supreme Ct. case number: 91-1052. (ch)

DATE	PROCEEDINGS
3/5/92	U.S. Supreme Court order dated March 2, 1992 at S.C. number: 91-1052, denying petition for writ of certiorari by Appellant Beth Ann Goodwin, filed. (ch)
3/5/92	U.S. Supreme Court order dated March 2, 1992 at S.C. number: 91-781, granting petition for writ of certiorari by Appellee USA, filed. (ch)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 89-1411

UNITED STATES OF AMERICA, PLAINTIFF,

v.

A PARCEL OF LAND, BUILDINGS, APPURTENANCES AND IMPROVEMENTS KNOWN AS 92 BUENA VISTA AVENUE[,] RUMSON, NEW JERSEY[,] DEFENDANT.

VERIFIED COMPLAINT

The United States of America by its attorney, Samuel A. Alito, United States Attorney for the District of New Jersey, for its complaint, says:

1. This *in rem* action is brought pursuant to 21 U.S.C. § 881, *et seq.*

2. Jurisdiction is vested in this Court pursuant to 28 U.S.C. §§ 1345, 1355, 1356 and 1395 and Title 21, U.S.C. § 881(a)(6) and § 881(a)(7).

3. That defendant real property with buildings, appurtances, and improvements is more fully described as follows:

Tax Map. Reference: Municipality of Rumson, Block No. 114, Lot No. 13 .

The property consists of the land and all the buildings and structures on the land in the City of Rumson County of Monmouth and the State of New Jersey. The legal description is:

BEGINNING at a measurement standing in the westerly side of Buena Vista Avenue distant 2420.35 feet measured in a southerly direction from the intersection formed by the westerly side of Buena Vista Avenue and the southerly side of Rumson Road, and running thence

1. South 26 degrees 23 minutes east 200.15 feet along the westerly side of Buena Vista Avenue to a point therein; thence

2. South 65 degrees 51 minutes 30 seconds west 409.00 feet to a point; thence

3. North 24 degrees 08 minutes 30 seconds west 160 feet to a point; thence

4. North 65 degrees 51 minutes 30 seconds east 180.00 feet to a point; thence

5. North 21 degrees 41 minutes 30 seconds east 57.39 feet to a point; thence

6. North 65 degrees 51 minutes 30 seconds east 180.00 feet to the point and place of beginning.

BEING the same premises known as 92 Buena Vista Avenue, Rumson, New Jersey.

BEING Lot 13 in Block 114 as shown on the official tax map of the Borough of Rumson, Monmouth County, New Jersey, revised December 1962.

The above description is made in accordance with a survey dated November 8, 1978, made by Thomas Santry.

Being the same lands and premises as conveyed to Martha G. Nichols by deed from John Edward Saker and Joan Phyllis Saker, his wife, dated November 13, 1978 and recorded November 15, 1978 in Deed Book 4136, page 92.

4. That defendant real property with buildings, appurtenances, and improvements was purchased with the proceeds traceable to an exchange for a controlled substance in violation of Title 21, United States Code, punishable by at least one year's imprisonment, to wit: Title 21, United States Code, Sections 841, 846, 848, 952 and 963.

5. That defendant real property with buildings, appurtenances and improvements was purchased on November 15, 1982 by Beth Ann Goodwin, nee Shurack as a nominal party for Joseph Anthony Brenna a/k/a Joseph Crawford, a/k/a Joseph Cavanaugh, a/k/a Joe Smith, a/k/a Little Joe for approximately $240,000, with funds provided by Joseph Anthony Brenna which were the proceeds traceable to an exchange for a controlled substance in violation of Title 21, United States Code, Sections 841, 846, 848, 952 and 963.

6. That between 1982 and 1986 Joseph Anthony Brenna, a/k/a Joseph Crawford, a/k/a Joseph Cavanaugh, a/k/a Joe Smith, a/k/a Little Joe, has been involved in a scheme to import the controlled substance, marijuana, into the United States, from a place outside thereof, namely Colombia.

7. That the defendant property is currently titled in the name of Beth Ann Shurack by virtue of a Warranty Deed recorded in Monmouth County Official Records Book 4382, Page 403, on November 30, 1982.

8. That a 10% contract deposit of $24,000 was paid by Beth Ann Goodwin, nee Shurack, through her attorney's, Craig Davis' law firm, Mason, Griffin and Pierson of Princeton, New Jersey on October 29, 1982 to the law firm of Kirkpatrick and Rathman of Rumson, New Jersey, attorneys for the sellers.

9. That Beth Ann Goodwin, nee Shurack has, since 1980, no visible means of support.

10. That Joseph Anthony Brenna on or about November 5, 1982 caused approximately $216,000 to be wire transferred to the law firm of Mason, Griffin and Pierson of Princeton, New Jersey, attorneys for the buyer Beth Ann Goodwin nee Shurack from Onchan International Finance Co. Ltd., Tortola, British Virgin Islands.

11. Approximately $216,000 was transferred by wire to New Jersey by the Bank of Nova Scotia from a certificate of deposit for Onchan International Finance Co. Ltd., Tortola, British Virgin Islands.

12. That Joseph Anthony Brenna obtained this $216,000 which was used to purchase the defendant property from criminal acts involving the importation, possession and distribution of controlled substances.

13. That Joseph Anthony Brenna pled guilty on September 29, 1988 to a misdemeanor violation of 31 U.S.C. § 5322 and 18 U.S.C. § 2, in that he willfully failed to file a Report of International Transportation of Currency or Monetary Instruments ("CMIR") for the transfer of $225,000 as required by 31 U.S.C. § 5316 and 31 C.F.R. § 1032. Part of these funds were used by Beth Ann Goodwin, nee Shurack as a nominal party for Joseph Anthony Brenna for maintenance and upkeep of the defendant property.

14. That Joseph Anthony Brenna obtained this $225,000 which was used to maintain the defendant property from criminal acts involving the importation, possession and distribution of controlled substances.

15. That the defendant property has been listed for sale at approximately $1,200,000.

16. That Beth Ann Goodwin, nee Shurack executed a first mortgage lien in favor of Berkely Federal Savings and Loan Association of New Jersey in the amount of $150,000, recorded on May 10, 1988 in Mortgage Book 4491, page 627.

17. That Joseph Anthony Brenna, accumulated huge profits by engaging in multiple criminal acts involving the importation, possession and distribution of controlled substances before, during and after the acquisition of the defendant property of Beth Ann Goodwin, nee Shurack.

18. That because the defendant real property is a proceed traceable to exchanges of controlled substances, such defendant real property is subject to seizure and forfeiture under the provisions of 21 U.S.C. § 881(a)(6).

19. That in or about December 1986, the residence at 92 Buena Vista Avenue, Rumson, New Jersey, was used to facilitate the distribution of proceeds traceable to an exchange for a controlled substance, in violation of Title 21, U.S.C., Section 841, 846, 848, 952 and 963. That in or about December 1986, in the premises located at 92 Buena Vista Avenue, Rumson, New Jersey, Joseph Anthony Brenna, paid to a crew member of a marijuana smuggling venture, $30,000 which is traceable to an exchange for a controlled substance, in violation of Title 21, U.S.C., Section 841, 846, 848, 952 and 963.

20. That by reason of the foregoing, the defendant real property has become and is forfeited to the United States of America, plaintiff herein, pursuant to the provisions of 21 U.S.C. § 881(a)(7).

WHEREFORE, plaintiff, the United States of America, prays that due process issue to enforce the forfeiture and to give notice to the interested parties to appear and show cause why the forfeiture should not be decreed, and prays that the defendant real property be condemned and forfeited to the United States of America and be delivered into the custody of the United States Marshals Service for disposition according to law, and for such other further relief as this Court may deem just and proper.

The defendant real property is and during the pendency of this action, will remain within the municipality of

Rumson, New Jersey, a part of the District of New Jersey, within jurisdiction of this Court.

Respectfully submitted,

SAMUEL A. ALITO, JR.
United States Attorney

By: Jerome L. Merin
JEROME L. MERIN
Assistant U.S. Attorney
Deputy Chief, Civil Division

I HEREBY CERTIFY that the above and foregoing is a true and correct copy of the original on file in my office.

ATTEST:
WILLIAM T. WALSH, Clerk
United States District Court
District of New Jersey

By: [Signature Illegible]
Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No.

UNITED STATES OF AMERICA, PLAINTIFF,

v.

A PARCEL OF LAND, BUILDINGS, APPURTENANCES AND IMPROVEMENTS KNOWN AS 92 BUENA VISTA AVENUE[,] RUMSON, NEW JERSEY[,] DEFENDANT.

VERIFICATION

RICHARD GIACOBBE, of full age, being duly sworn, deposes and says:

1. I am a Special Agent of the Drug Enforcement Administration, Ft. Lauderdale, Florida office, and as such have been assigned the responsibility for the within matter.

2. The facts as set forth in the Complaint are, to the best of my information, knowledge and belief, true.

Sworn and subscribed to before me
this 20th day of March, 1989

/s/ DORY LINGO
Notary Public of the State of
Florida. My Commission expires

/s/ S/A Richard N. Giacobbe
RICHARD GIACOBBE
Special Agent
Drug Enforcement Administration

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 89-1411

UNITED STATES OF AMERICA, PLAINTIFF,

v.

A PARCEL OF LAND, BUILDINGS, APPURTENANCES AND IMPROVEMENTS KNOWN AS 92 BUENA VISTA AVENUE[,] RUMSON, NEW JERSEY[,] DEFENDANT.

SUMMONS AND WARRANT FOR ARREST

TO THE UNITED STATES MARSHALS, AND/OR ANY OTHER DULY AUTHORIZED FEDERAL LAW ENFORCEMENT OFFICER:

A complaint *In Rem* having been filed this 2nd day of April, 1989 in the U.S. District Court, District of New Jersey, alleging that the real property and buildings known as 92 Buena Vista Avenue, Rumson, New Jersey, (hereinafter "defendant property"), was purchased with the proceeds traceable to a felony violation of the Controlled Substances Act and was used to facilitate a violation of Title 21, U.S.C., Sections 841, 846, 848, 952, and 963 and is therefore, subject to seizure and forfeiture to the United States pursuant to Title 21, U.S.C. Section 881(a)(6) and Section 881(a)(7);

And, the Court being satisfied that there is probable cause to believe that the defendant property so described therein was purchased with proceeds traceable to a felony

violation of the Controlled Substances Act and the grounds for application for issuance of a seizure warrant exist as stated in the annexed complaint Verified by Special Agent RICHARD GIACOBBE of the Drug Enforcement Administration and title having vested in the United States by action of law pursuant to 21 U.S.C. §881(h);

YOU ARE, THEREFORE, HEREBY COMMANDED to arrest and seize said defendant property and maintain custody as provided by 19 U.S.C. §1605 until further order of this Court. The United States Marshal for the District of New Jersey (Hereinafter "Marshal's Service") shall use its discretion in maintaining the defendant property, and may use means, both within and without the Marshal's Service, as it deems appropriate to protect and maintain said defendant property;

YOU ARE FURTHER COMMANDED TO POST, upon said defendant property in an open and visible manner, notice of such seizure at the time thereof making the government's seizure open and notorious;

YOU ARE FURTHER ORDERED TO SERVE upon the record owners of the defendant property and its occupants a copy of this warrant and notice of any transaction in connection with this seizure in a manner consistent with Rule C of the Supplemental Rules for Certain Admiralty and Maritime Claims within a reasonable time of seizure,

AND IT IS FURTHER ORDERED THAT that the Marshal's Service shall conduct a structural inspection of the defendant property, in order to enable the Marshal's Service to determine the condition of the defendant property at the time of its seizure and determine whether any conditions exist that threaten the security of the defendant property or its occupants; and

The Marshal's Service, and any of its authorized agents or designees, shall have at its discretion the authority to

dispose of, by any means available, perishable, contaminated, flammable, explosive or volatile items located at the defendant property to the extent that such items constitute a danger to the occupants or to the public. An inventory will be kept as to those items and the method of disposal used; and

If the defendant property is vacant, or becomes vacant, or in [sic] uninhabitable, the Marshal's Service, or any of its authorized agents and designees, shall, in addition to an inspection, secure the defendant property and take such action as the Marshal's Service deems necessary to protect the personal property of the occupants of the defendant property; and

FURTHER IT IS HEREBY ORDERED that the record owners and occupants of the defendant property acknowledge in writing the seizure of their interest in the defendant property and service of this warrant. Any occupants of the defendant property who desire to continue to reside at the defendant property following seizure shall promptly enter into occupancy agreements with the Marshal's Service;

AND FURTHER IT IS HEREBY ORDERED that the Marshal's Service shall, in its discretion, arrest any occupant of the defendant property who attempts to obstruct this order or prevent service and seizure as ordered herein;

AND FURTHER IT IS HEREBY ORDERED that a notice of pendency be filed with the appropriate recorder of deeds to give record notice of the forfeiture of the defendant property;

AND UPON APPLICATION of the plaintiff, United States of America, and pursuant to All Writs Act (Title 28 U.S.C. §1651(a), the Court shall issue any order necessary to effectuate and prevent the frustration of the order of this Court during the execution of this seizure warrant, and after; and

A RETURN of this warrant shall be made within ten (10) days of execution with notice to the Court of the individuals upon whom copies were served and the manner employed, and a statement as to satisfaction of the orders herein issued.

Dated: New Jersey
April 12, 1989

/s/ [Signature Illegible]
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 89-1411

IN RE: A PARCEL OF LAND, BUILDINGS, APPURTENANCES AND IMPROVEMENTS

BETH ANN GOODWIN, CLAIMANT

CLAIM

Pursuant to Federal Rules of Admiralty and Maritime Claims (C)(6), Petitioner Beth Ann Goodwin avers the following:

1. The subject matter of this *in rem* action is real property with buildings, appurtenances and improvements known as 92 Buena Vista Avenue, located in Rumson, New Jersey.

2. Since November 15, 1982, Petitioner has been the sole lawful, beneficial and rightful owner of the real property in question.

3. The real property in question is, and always has been, titled in the name of Beth Ann Shurack by virtue of Warranty Deed recorded in Monmouth County Official Records Books on November 30, 1982.

4. Petitioner did not purchase defendant real property as a nominal party for Joseph Anthony Brenna a/k/a Joseph Crawford, a/k/a Joseph Cavanaugh, a/k/a Joe Smith, a/k/a Little Joe.

5. Petitioner had no knowledge that any of the funds used to purchase the real property in question were derived from drug trafficking or other illegal activities.

6. Accordingly, Petitioner should be granted her motion to defend this action, and the seized real property should be returned.

WHEREFORE, it is respectfully requested that this Honorable Court enter an Order granting Petitioner a right to defend this action.

HOYLE, MORRIS & KERR

By: /s/ Ralph A. Jacobs
Lowell F. Raeder
Ralph A. Jacobs
One Liberty Place
Suite 4900
1650 Market Street
Philadelphia, PA 19103
(215) 981-5700
Attorneys for Petitioner

DECLARATION OF BETH ANN GOODWIN

I, Beth Ann Goodwin, declare under penalty of perjury that the foregoing is true and correct.

Executed on the 29th day of April, 1989.

/s/ Beth Ann Goodwin
Beth Ann Goodwin

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 89-1411

UNITED STATES OF AMERICA, PLAINTIFF,

v.

A PARCEL OF LAND, BUILDINGS, APPURTENANCES AND IMPROVEMENTS KNOWN AS 92 BUENA VISTA AVENUE[,] RUMSON, NEW JERSEY[,] DEFENDANT.

CONSENT ORDER

[Filed July 8, 1989]

THIS MATTER having been opened to the court by the United States Attorney for the District of New Jersey, Samuel A. Alito, Esq. (appearing by Neil Gallagher, Esq.) and Walder, Sondak, Berkeley & Brogan attorneys for Beth Ann Goodwin (appearing by James A. Plaisted, Esq.) and the court having reviewed the submissions of counsel and having heard the arguments of counsel with respect to the various matters raised in the telephone conference call on July 14, 1989 and for good cause shown;

IT IS ON THIS 27th DAY OF July ORDERED THAT

Claimant, Beth Ann Goodwin shall have an extension of time to answer or object to the government interrogatories until five days after the United States responds as to whether it will agree that any answers to interrogatories provided by Ms. Goodwin will not be deemed a waiver of Ms. Goodwin's privilege against self incrimination; and

IT IS FURTHER ORDERED that the deposition of Shaun Murphy will be conducted at the expense of the United States* at a reasonably convenient place in the Metropolitan area to be selected by the United States in its sole discretion prior to the end of the first week in August; however defense counsel must pay his own costs and expenses in getting to that deposition; and

IT IS FURTHER ORDERED that United States shall produce Joseph Mazocca for a deposition prior to September 30, 1989 and if he has not been produced prior to that date the United States shall show cause as to why it should not be barred from utilizing Mr. Mazocca as a witness at the trial herein; and

IT IS FURTHER ORDERED that the United States shall have been deemed to refuse to produce the interview report and statements of Mr. Mazocca taken by any government agent including but not limited to Mr. Giacobbe for the purposes of any Motions by the Claimant: (1) to compel discovery, (2) for sanctions, or (3) for dismissal of the Complaint herein.

/s/ STANLEY R. CHESLER
Honorable Stanley R. Chesler
U.S. Magistrate
U.S. District Court
District of New Jersey

* This provision of the aforesaid order is without prejudice to any rights the United States may have to the award of said expenses as taxable costs should it prevail in the litigation.

U.S. DEPARTMENT OF JUSTICE
United States Attorney
District of New Jersey
970 Broad Street, Room 502
Newark, New Jersey 07102
(201) 621-2932

NRG:ra/0973W/P109

201-621-2700
FTS 348-2700

August 18, 1989

James A. Plaisted, Esq.
Walder, Sondak, Berkeley & Brogan
5 Becker Farm Road
Roseland, New Jersey 07068

Re: UNITED STATES v. A PARCEL OF LAND, etc.
KNOWN AS 92 VISTA AVE., RUMSON, N.J.
CIVIL ACTION NO. 89-1411

Dear Mr. Plaisted:

I have your letter of August 9, 1989. The stipulation you prepared for the rental of the property is not acceptable to the United States. Given your inflexible position I will not respond with alternative suggestions.

As to the balance of your letter I (again) take issue with your inflammatory characterization of the actions of my client. It does not advance this case to have you constantly referring to everything as "precipitous" or "unfair" etc.

Please be advised that given the wide scope of your discovery into what is, as you are aware, a wide-ranging grand jury criminal investigation I will not be producing Mr. Mazocco for a deposition at this time. It is clear that your inquiries of Mr. Mazocco will go well beyond the events of the purchase of the house in question. Given the totality of this lawsuit, we believe that a stay of discovery

in this matter would be appropriate and we will expeditiously file such an application.

You will be hearing from me further in this regard.

Very truly yours,

SAMUEL A. ALITO, JR[.]
United States Attorney

/s/ Neil R. Gallagher

By: NEIL R. GALLAGHER
Assistant U.S. Attorney

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 89-1411

UNITED STATES OF AMERICA, PLAINTIFF,

v.

A PARCEL OF LAND, BUILDINGS, APPURTENANCES AND IMPROVEMENTS KNOWN AS 92 BUENA VISTA AVENUE[,] RUMSON, NEW JERSEY[,] DEFENDANT.

[Original Filed Sep. 1, 1989]

NOTICE OF MOTION

SIRS:

PLEASE TAKE NOTICE that the claimant and counterclaimant Beth Ann Goodwin by her counsel, Walder, Sondak, Berkeley & Brogan (appearing by James A. Plaisted, Esq.) will move before the Honorable Harold W. Ackerman at the United States Court House, Newark, New Jersey on September 25, 1989 at 10:00 a.m. or at such other time as the court may designate for an Order dismissing the Complaint and the Seizure herein and/or in the alternative granting Summary Judgment pursuant to Rule 56 of the Federal Rules Civil Procedure against the United States and/or ordering the United States to produce the documents and witnesses requested and answer the interrogatories sought.

In support of the Motion the claimant and counterclaimant relies on the Affidavit of James A. Plaisted, the Memorandum of Law submitted herewith, and the depos[i]tions and exhibits that comprise the record herein.

WALDER, SONDAK, BERKELEY & BROGAN, P.A.
5 Becker Farm Road
Roseland, New Jersey 07068
(201) 992-5300
Attorneys for Claimant and Counterclaimant
Beth Ann Goodwin

Dated: August 31, 1989 By: /s/ James A. Plaisted
JAMES A. PLAISTED

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 89-1411

UNITED STATES OF AMERICA, PLAINTIFF,

v.

A PARCEL OF LAND, BUILDINGS, APPURTENANCES AND IMPROVEMENTS KNOWN AS 92 BUENA VISTA AVENUE[,] RUMSON, NEW JERSEY[,] DEFENDANT.

VERIFICATION

BETH ANN GOODWIN, of full age, being duly sworn, deposes and says:

1. I am the Beth Ann Goodwin as described in the attached Petition.

2. The facts as set forth in the Petition are, to the best of my information, knowledge and belief, true.

/s/ Beth Ann Goodwin
BETH ANN GOODWIN

Sworn and subscribed to before me
this 19th day of May, 1989

/s/ Kelly Riley
KELLY RILEY
Notary Public, State of New Jersey
Qualified in Hudson County
Commission Expires October 25,
1990

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 89-1411

UNITED STATES OF AMERICA, PLAINTIFF,

v.

A PARCEL OF LAND, BUILDINGS, APPURTENANCES AND IMPROVEMENTS KNOWN AS 92 BUENA VISTA AVENUE[,] RUMSON, NEW JERSEY[,] DEFENDANT.

PETITION FOR REMISSION AND MITIGATION OF JUDICIAL FORFEITURE

To: Richard Thornburg,
Attorney General of the United States of America
Main Justice Building
10th and Pennsylvania Avenues, N.W.
Washington, D.C. 20530

Beth Ann Goodwin nee Beth Ann Shurack by her attorneys Walder, Sondak, Berkeley & Brogan (appearing by James A. Plaisted) petitions upon information and belief in connection with the above referenced forfeiture as follows:

1. Petitioner lived with Joseph Anthony Brenna during the period from approximately 1981 until approximately 1987. Petitioner maintained an intimate personal relationship during that period with Brenna and he supported her and her children.

2. Mr. Brenna made a gift of the initial funds used for the down payment on the above-referenced property to the petitioner.

3. Mr. Brenna has no ownership interest or other legal interest in the above-referenced property. Mr. Brenna has not used the property in any way since 1987.

4. In and around October, 1987, Mr. Brenna vacated from the premises of the property.

5. In and around December 1987 after the petitioner was assaulted by Mr. Brenna, petitioner told Mr. Bre[]nna not to reappear at the property.

6. The petition has used the house and property herein as her home and the home for her three children from 1982 up to the present date.

7. During 1988 petitioner began to pay all of the bills to maintain and improve the property without the aid of Mr. Brenna.

8. Petitioner purchased the property in her own name in 1982. The property is deeded to petitioner and petitioner alone and any mortgages are and have been solely in the petitioner's name.

9. Petitioner has always treated the property as her own and has left it in her Will for the benefit of her three children.

10. Petitioner is the sole owner of the above referenced property and has a bona fide ownership interest in the seized property.

11. Petitoner has no knowledge that the property was involved in any violation of the law or that the funds given to her by Mr. Brenna which she used to purchase the property were traceable to drug sales. Petitioner has no knowledge that any particular violation which may have occurred subjected the property to seizure and forfeiture. Petitioner had no knowledge that Mr. Brenna had a record

for violating the laws of the United States and petitioner has taken all reasonable steps to prevent the illegal use of the property.

WHEREFORE Petitioner requests that United States remit the above referenced property to her in its entirety.

WALDER, SONDAK, BERKELEY & BROGAN
Attorneys for Beth Ann Goodwin

By: /s/ James A. Plaisted
JAMES A. PLAISTED

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 90-6055-CR-GONZALEZ(S)
18 U.S.C. 2
21 U.S.C. 848
21 U.S.C. 853
21 U.S.C. 952(a)
21 U.S.C. 963

UNITED STATES OF AMERICA[,] PLAINTIFF,

v.

JOSEPH C. MAIORINO, A/K/A JOE FROM ANGUILLA,
JOSEPH A. BRENNA, A/K/A LITTLE JOE, A/K/A JOSEPH
CAVANAUGH, A/K/A JOSEPH CRAWFORD,
ROBERT J. KENNEDY, A/K/A BOB, AND
JAMES H. BRENNA, A/K/A JIMMY, DEFENDANTS.

INDICTMENT

The Grand Jury charges that:

COUNT I

From on or about January 1, 1982 to in or about December 1988, in the Southern District of Florida and elsewhere, defendant

JOSEPH C. MAIORINO
a/k/a Joe from Anguilla,

knowingly and intentionally engaged in a continuing criminal enterprise, in that he knowingly and intentionally violated Title 21, United States Code, Sections 952(a) and

963, as described in Counts III through VII of this indictment, which counts are incorporated herein by reference, which violations were part of a continuing series of violations of subchapters I and II of the Drug Abuse and Control Act of 1970 undertaken by defendant JOSEPH C. MAIORINO in concert with at least five other persons with respect to whom defendant JOSEPH C. MAIORINO occupied a position of organizer, supervisor, and manager and from which continuing criminal violations defendant JOSEPH C. MAIORINO obtained substantial income and resources.

All in violation of Title 21, United States Code, Section 848.

Forfeiture

Upon conviction of defendant JOSEPH C. MAIORINO of engaging in a Continuing Criminal Enterprise, as set forth in this Count (Count I), in violation of Title 21, United States Code, Sections 848 and 853, the United States is entitled to forfeiture of, and the defendant will forfeit to the United States, all profits and property constituting, or derived from, any proceeds obtained directly or indirectly by him in such enterprise, and shall forfeit his interest in, or claim against, any and all property and contractual rights of any kind affording a source of influence over such property; as was used by him to facilitate such enterprise or was obtained with the profits or proceeds of profits of such enterprise, including, but not limited to, the following:

Cash in the amount of $24,000,000 received as proceeds of narcotics trafficking.

THE GRAND JURY FURTHER CHARGES THAT:

COUNT II

From on or about January 1, 1982 to in or about December 1988, in the Southern District of Florida and elsewhere, defendant

JOSEPH A. BRENNA,
a/k/a Little Joe,
a/k/a Joseph Cavanaugh,
a/k/a Joseph Crawford,

knowingly and intentionally engaged in a continuing criminal enterprise, in that he knowingly and intentionally violated Title 21, United States Code, Sections 952(a) and 963, as described in Counts III through VII of this indictment, which counts are incorporated herein by reference, which violations were part of a continuing series of violations of subchapters I and II of the Drug Abuse and Control Act of 1970 undertaken by defendant JOSEPH A. BRENNA in concert with at least five other persons with respect to whom defendant JOSEPH A. BRENNA occupied a position of organizer, supervisor, and manager, and from which continuing series of violations defendant JOSEPH A. BRENNA obtained substantial income and resources.

All in violation of Title 21, United States Code, Section 848.

Forfeiture

Upon convicton of defendant JOSEPH A. BRENNA of engaging in a Continuing Criminal Enterprise, as set forth in this Count (Count II), in violation of Title 21, United States Code, Sections 848 and 853, the United States is entitled to forfeiture of, and the defendant will forfeit to the

United States, all profits and property constituting, or derived from, any proceeds obtained directly or indirectly by him in such enterprise, and shall forfeit his interest in, or claim against, any and all property and contractual rights of any kind affording a source of influence over such property; as was used by him to facilitate such enterprise or was obtained with the profits or proceeds of profits of such enterprise, ıncluding, but not limited to, the following:

A. Cash in the amount of $24,000,000 received as proceeds of narcotics trafficking.

B. Certain real property known and numbered as 92 Buena Vista Ave., Rumson, New Jersey and described as

Municipality of Rumson, Block No. 114, Lot No. 13 property. The property consists of the land and all the buildings and structures on the land in the Borough of Rumson County of Monmouth and State of New Jersey. The legal description is:

BEGINNING at a monument standing in the westerly side of Buena Vista Avenue distant 2420.35 feet measured in a southerly direction from the intersection formed by the westerly side of Buena Vista Avenue and the southerly side of Rumson Road, and running thence

1. South 26 degrees 23 minutes east 200.15 feet along the westerly side of Buena Vista Avenue to a point therein; thence
2. South 65 degrees 51 minutes 30 seconds west 409.00 feet to a point; thence
3. North 24 degrees 08 minutes 30 seconds west 160.00 feet to a point; thence
4. North 65 degrees 51 minutes 30 seconds east 180.00 feet to a point; thence
5. North 21 degrees 41 minutes 30 seconds east 57.39 feet to a point; thence

6. North 65 degrees 51 minutes 30 seconds east 180.00 feet to the point and place of beginning.

C. A certain marine vessel known as the "Sahara" and described as a 60-foot wooden hulled Stowington marine vessel.

GRAND JURY FURTHER CHARGES THAT:

COUNT III

From on or about January 1, 1982 and continuing thereafter to in or about December 1988, in the Southern District of Florida and elsewhere, defendants

JOSEPH C. MAIORINO, a/k/a Joe from Anguilla,
JOSEPH A. BRENNA, a/k/a Little Joe,
a/k/a Joseph Cavanaugh, a/k/a Joseph Crawford,
ROBERT J. KENNEDY, a/k/a Bob, and
JAMES H. BRENNA, a/k/a Jimmy,

knowingly and intentionally combined, conspired, confederated and agreed with each other and with persons known and unknown to the Grand Jury to commit offenses against the United States, that is to violate Title 21, United States Code, Section 952(a).

It was the purpose and object of this conspiracy to knowingly and intentionally import into the United States, from a place outside thereof, a Schedule I controlled substance, that is, a quantity of marijuana in excess of 1,000 kilograms.

All in violation of Title 21, United States Code, Section 963.

GRAND JURY FURTHER CHARGES THAT:

COUNT IV

In or about April 1985, in the Southern District of Florida and elsewhere, defendants

JOSEPH C. MAIORINO, a/k/a Joe from Anguilla,
JOSEPH A. BRENNA, a/k/a Little Joe,
a/k/a Joseph Cavanaugh, a/k/a Joseph Crawford, and
ROBERT J. KENNEDY, a/k/a Bob,

knowingly and intentionally imported into the United States, from a place outside thereof, and knowingly and intentionally aided and abetted such importation of, a Schedule I controlled substance, that is, a quantity of marijuana in excess of 1,000 kilograms.

All in violation of Title 21, United States Code, Section 952(a), and Title 18, United States Code, Section 2.

GRAND JURY FURTHER CHARGES THAT:

COUNT VI

In or about October 1986, in the Southern District of Florida and elsewhere, defendants

JOSEPH C. MAIORINO, a/k/a Joe from Anguilla,
JOSEPH A. BRENNA, a/k/a Little Joe,
a/k/a Joseph Cavanaugh, a/k/a Joseph Crawford, and
JAMES H. BRENNA, a/k/a Jimmy,

knowingly and intentionally imported into the United States, from a place outside thereof, and knowingly and intentionally aided and abetted such importation of, a Schedule I controlled substance, that is, a quantity of marijuana in excess of 1,000 kilograms.

All in violation of Title 21, United States Code, Section 952(a), and Title 18, United States Code, Section 2.

GRAND JURY FURTHER CHARGES THAT:

COUNT VII

In or about November 1986, in the Southern District of Florida and elsewhere, defendants

JOSEPH C. MAIORINO, a/k/a Joe from Anguilla,
JOSEPH A. BRENNA, a/k/a Little Joe,
a/k/a Joseph Cavanaugh, a/k/a Joseph Crawford, and
JAMES H. BRENNA, a/k/a Jimmy,

knowingly and intentionally imported into the United States, from a place outside thereof, and knowingly and intentionally aided and abetted such importation of, a Schedule I controlled substance, that is, a quantity of marijuana in excess of 1,000 kilograms.

All in violation of Title 21, United States Code, Section 952(a), and Title 18, United States Code, Section 2.

A TRUE BILL

/s/ Michael D. Marcus
FOREPERSON

/s/ Dexter W. Lehtinen (J.P.W.)
DEXTER W. LEHTINEN
United States Attorney
Southern District of Florida

Certified to be a true and
correct copy of the original
Robert M. March, Clerk
U.S. District Court
Southern District of Florida
By T Paler
[Illegible] Clerk
Date Apr. 13, 1990

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

[Civil Action No. 89-1411]

UNITED STATES OF AMERICA

v[s].

A PARCEL OF LAND, BUILDINGS, APPURTENANCES AND IMPROVEMENTS KNOWN AS 92 BUENA VISTA AVENUE, RUMSON, NEW JERSEY.

Deposition of SHAUN MURPHY, taken at the Office of the United States Attorney for the District of New Jersey, 970 Broad Street, Newark, New Jersey, on August 2, 1989, commencing at about ten o'clock in the forenoon, before William Sokol, a Notary Public and Certified Shorthand Reporter of the State of New Jersey.

APPEARANCES:

SAMUEL A. ALITO, JR., ESQ.
United States Attorney for the District of N.J.
By: NEIL GALLAGHER, ESQ.[,]
Assistant United States Attorney.

WALDER, SONDAK, BERKELEY & BROGAN
For Petitioner
By: JAMES PLAISTED, ESQ.

BILL SOKOL, C.S.R.
(201) 654-8054

[2] **SHAUN PATRICK MURPHY, sworn.**

DIRECT EXAMINATION

BY MR. PLAISTED:

Q. Mr. Murphy, this is an action by the United States Government to seize the house and home of a woman by the name of Beth Ann Goodwin at 92 Buena Vista Avenue in Rumson, New Jersey, where she has resided with her children since approximately 1982.

The Government has produced you here today indicating that you have evidence to provide in this action.

Have you ever been to 92 Buena Vista Avenue in Rumson, New Jersey?

A. No.

Q. Do you know anything about that house?

A. No.

Q. Have you ever met Beth Ann Goodwin?

A. No.

Q. Her maiden name was Shurack; have you ever met Beth Ann Shurack?

A. No.

Q. Have you ever met any of her children?

A. No.

Q. Have you ever spoken to her?

A. No.

[3] Q. Do you know how Beth Ann Goodwin purchased 92 Buena Vista Avenue in Rumson, New Jersey?

A. No.

Q. Do you know anything about the finances of Beth Ann Goodwin?

A. No.

Q. Other than Federal Agents has anyone ever mentioned Beth Ann Goodwin or Beth Ann Shurack to you?

A. No.

Q. Mr. Murphy, let me show you what has been marked previously in this case as Goodwin Exhibit 18 on 6/27/89. It purports to be a transcript of testimony in the trial of Joseph Brenna held in the Virgin Islands. Contained therein, starting at approximately page 34-A, would appear to be testimony by Shaun Patrick Murphy. Could you look at that and tell me whether that is a transcript of your testimony in that trial?

A. It does look like it is.

Q. And have you reviewed that at various times?

A. Yes, I have.

Q. And was it truthful and accurate when you gave it?

A. It was.

Q. And is it still truthful and accurate today?

A. It is.

[4] Q. Now, in this case Special Agent Giacobbe, who is present here today, has said that you have told him that you don't have any personal knowledge of what Brenna did for a living. Have you said that to him?

A. I have no direct knowledge at all of what he does, correct.

Q. And you have said that to the DEA Agents that you have worked with?

A. I have.

Q. And Special Agent Giacobbe said that he didn't believe that you had any personal knowledge of what Brenna did for a living; is that accurate?

A. Correct.

Q. Now, Mr. Brenna never told you how he earned his income then, correct?

A. Correct.

Q. Mr. Brenna never told you how he acquired his assets; is that correct?

A. Correct.

Q. Mr. Brenna never gave you any insight into the background of his financial affairs, correct?

A. Correct.

Q. You handled investments for a great number of clients, correct?

A. Correct.

[5] Q. Approximately how many?

A. I had approximately five hundred companies.

Q. And would that represent investments that you were handling for at least five hundred clients?

A. No, probably I managed funds or investments for approximately two hundred of those companies.

Q. Who managed the investments for the other three hundred?

A. They did not have any investments, they were just holding companies.

Q. And when you say they were just holding companies, did they have any assets whatsoever?

A. Only shares in other companies.

Q. In any case, you had well in excess of two hundred clients?

A. Correct.

Q. And was that at any one given time?

A. It started to build up from 1980 to 1986.

Q. In March 1986 was the time that you had at least two hundred customers?

A. I did.

Q. There were customers I presume you had who ceased using you over that period of time, correct?

A. Yes.

Q. So there are all told over two hundred people over that period who you were handling investments for?

[6] A. Yes, probably.

Q. Do you know precisely as you sit here now how many in all there were of your clients for whom you

handled investments during the entire time that you were in Tortola?

A. Probably somewhere in the region of three hundred clients.

Q. How long were you managing investments in Tortola?

A. From September 1980 through March 1986.

Q. It is true, is it not, that you made it a point not to inquire of clients as to the source of their income?

A. Correct.

Q. You made it a point not to inquire of your clients as to how they made their money?

A. Correct.

Q. You made it a point not to be involved in any way in their financial affairs other than to handle their investments?

A. That's correct.

Q. That was your business practice?

A. It was.

Q. And you followed that practice with Mr. Brenna, correct?

[7] A. Yes.

Q. And you knew a Mr. Cavanaugh; is that correct?

A. I knew a gentleman known as Joseph Cavanaugh and also his other name he used, as Joseph Crawford.

Q. And when you would take money to handle the investments on behalf of clients you would put it in company names for those clients so that their real names would not be revealed; is that correct?

A. Correct.

Q. And so it wasn't unusual in your line of business that he was not utilizing his, the name Brenna but was utilizing a different name?

A. It was unusual, it was unique, to the best of my knowledge, because I did not know that Mr. Cavanaugh's real name was Mr. Brenna.

Q. From whom did you learn that that was his real name?

A. DEA Agents.

Q. You worked with the DEA Agents for a great deal of time; is that correct?

A. Correct, since March 1986.

Q. And you spent a great number of months with them working on a regular basis; is that correct?

A. Yes.

Q. You learned a lot of facts during that period of [8] time, correct?

A. With regard to what?

Q. During the time you worked with the DEA did you learn a great number of facts from the Agents about your clients that you didn't know previously?

A. Yes.

Q. And now, would it be fair to say that pursuant to your practice of not seeking to learn the source of funds you did not make any effort to learn the source of any funds Mr. Brenna gave you?

A. Correct.

Q. And you in fact did not know the source of any of those funds, correct?

A. Correct.

Q. As you sit here now do you know the precise date that he gave you funds to invest for him?

A. If I were to look at my files I could be more precise; I can give you the approximate days.

Q. Do you know the approximate date from reviewing your records in preparation for your testimony here today?

A. I do.

Q. And those you reviewed during the last day or two, correct?

A. Yes.

MR. PLAISTED: Can I have all of the records [9] Mr. Murphy has reviewed for the purpose of his testifying?

MR. GALLAGHER: Sure.

Shaun, are these–

A. Do you want me to go through them?

What we have here is a copy of the Stowell, Limited, Operations File, a copy of the Stowell Investments, Limited, Secretarial File, the original of the Minute Book for Stowell, the original of the Documents File for Stowell, the original Oscotia Bank File; number 2, the original of the Barclay's Bank File, we have the Secretarial File for American-Indian Investments, Limited, and we have the Operations File for Bartholome Investors, Limited, and finally, we have the Financial Management and Trust, Limited, Client Contact File for Joe Smith; and additional to that we have working papers that I have prepared while cooperating with the DEA.

Q. Now, the name Roger Smith on this one particular file, or the name Joseph Smith, who does that relate to?

A. Mr. Cavanaugh used the name Joe Smith.

Q. Well, did you give it to him for the purposes of your files?

A. I think we agreed upon it mutually as the name to be entered on the files.

Q. Did you have other clients who had similar [10] types of names put on their files that were not their own names?

A. Other clients had code words which we would use with the prefix "Mr." on them, correct, so, yes, other clients did have pseudonyms on the files.

Q. In fact it was your practice to give your clients a pseudonum of some sort?

A. Yes, but usually as a code, not so much on the face of the file.

This was not unique.

Q. You mean it was not unique to give them a different name than their real name?

A. Yes.

Q. You would select that name and talk to them about it?

A. Correct.

Q. You did that with most of your clients, did you not?

A. Some of my clients.

Q. So it was not unusual to give them a pseudonym when they bagan [sic] doing business with you, correct?

A. The pseudonym was given to enable them to access into the code.

Q. For what purpose?

It wasn't unusual to give them a pseudonym, [11] correct?

A. As a code word, yes.

Q. And was smith the code word for Mr. Brenna?

A. Mr. Cavanaugh, yes.

Q. Would you prefer I call him Mr. Cavanaugh?

A. I don't care.

At the time he was Cavanaugh.

Q. Now, the Customs on St. Thomas is remarkably lax, isn't it?

A. Very.

MR. GALLAGHER: Objection, he can answer, but I object to the form and his knowledge about whether Customs is lax or not.

Q. Does the "Bomba Charger" still run between St. Thomas and Tortola in the British Virgin Islands?

A. To the best of my knowledge, yes.

Q. When you get on a boat like the "Bomba Charger" you don't go through Customs, do you?

A. No.

Q. You just –

A. If you leave the country from any port in the United States you don't go through Customs.

Q. So there were no reports that you had to file when you picked up money in St. Thomas and took it to the British Virgin Islands via that method?

[12] MR. GALLAGHER: Objection, conclusion.

He may answer.

A. The lack of Customs does not mean that you do not have to follow the laws of the U.S.

Q. Did you know that at the time that you were operating –

A. I was aware there was some law with regard to disclosure.

Q. Did you ever tell anybody that you in essence thought if you weren't asked there wasn't a real reporting requirement by you taking money out of the –

A. Well, if no one ever asked you, I was aware that there was some requirement as to disclosure, I don't think I knew the exact formal how to do it, but I was aware that you should disclose funds being taken out of the country.

Q. My question was, did you ever tell anybody – perhaps when this investigation first started – that you didn't think there was any such reporting requirement from St. Thomas because they weren't asking?

A. No.

Q. But there certainly was a difference between exiting St. Thomas to go to the British Virgin Islands and exiting the mainland U.S. in terms of Customs?

A. No.

[13] Q. There was not?

A. No.

Q. Is there any difference between Customs in St. Thomas when you exit the American Virgin Islands and when you exit the mainland, in your experience?

A. There is a difference in Saint John on the particular day—well, in general what I used to do was to clear into Saint John and to clear out of Saint John on the same day and go across to St. Thomas.

Q. Would you not be asked when you would leave Saint John?

A. Not be asked what?

Q. Why did you do that?

A. You lost me.

Q. Why did you clear into Saint John and out of Saint John on the same day?

A. Very convenient.

Q. So it was a matter of convenience?

A. Yes, they let you do it, they probably appreciated you were going to St. Thomas—shouldn't have done that, but it saved you having to go clear in St. Thomas, which is a great nuisance, much easier to go into the first port-of-call and clear in and out instead of having to do it when you left.

Q. Now, in your trial testimony you said that you violated the currency exportation laws approximately [14] ten times by going out of the country without filing reports—let me show you page 40, the last question, going over to the next page—is that correct?

A. It is correct.

Q. And did you have an arrangement with a Mr. Levine who was a client of yours?

MR. GALLAGHER: Jim, at this point I want to place on the record that there is an ongoing Grand Jury investigation—

May I take a brief break in the deposition? I want to discuss the current status of Mr. Levine's case with Special

Agent Giacobbe, because we have a Grand Jury problem.

MR. PLAISTED: No problem.

I can use the time to look at the records that you have just given me this morning.

(Short recess.)

(Record read.)

MR. GALLAGHER: As I indicated before, we have had a brief discussion, the matter with Mr. Levine, I understand that there are related cases with Mr. Levine that are still before the Grand Jury, and I think we are starting to get away from this case, and I think we are starting to get into the potential interference with the Grand Jury down in Florida.

[15] I would prefer you not delve into it because we are starting to stray off the mark, and I would ask if you could stay with Mr. Brenna or anyone else, you know, related to him.

MR. PLAISTED: Why don't we just, there are references in the transcript as to violations of the CTR requirements and I want to probe those.

I can try to ask a couple of limited questions at first, and why don't you, if there comes a point where you think that you should instruct him not to answer, why don't you just do that? Just say, "Same instruction" and we will move along a little quicker.

In terms of that, I do have a number of questions about these other violations that I would like to put on the record.

MR. GALLAGHER: Okay.

Q. Let me start through them and let's see; at least for the purposes of establishing the record I would like to proceed that way.

MR. GALLAGHER: Sure.

Q. Was Mr. Levine a client of yours?

A. Yes.

Q. Did Mr. Levine provide you with money for investments?

[16] A. Yes.

Q. On approximately how many occasions?

A. Six or seven.

Q. And did you violate the CTR requirements in connection with Mr. Levine?

A. Yes.

Q. On those six or seven occasions?

A. Yes.

Q. Mr. Levine gave you very large amounts of money, correct?

A. Define "very large amounts of money".

Q. Much more than Mr. Brenna gave you, correct?

A. On each individual occasion, or in total?

Q. In total.

A. In total, yes.

Q. How much did he give you in total?

A. In excess of one million dollars.

Q. And you had other clients who gave you in excess of a million dollars, did you not?

A. Yes.

Q. In fact there were some clients who gave you as much as three to four million; is that correct?

A. I wouldn't be able to answer that without checking my records, but it is quite possible.

Q. Did you ever tell anyone that you had clients [17] who gave you more than three million dollars?

A. No.

Q. And you never told any Federal Agents that?

A. Yes, quite possibly.

Q. Did you have clients who gave you more than three million dollars?

A. Quite possibly, yes, maybe.

Q. You just don't know as you sit here?

A. I don't know without reviewing the files of the particular clients involved.

Q. How many files do you have access to that you would have to review to make that determination?

A. I would have to look into the affairs of two or three groups of clients.

Q. And who are those clients?

MR. GALLAGHER: At this point I think, Jim, I would like to—

MR. PLAISTED: This will go faster, if you are going to let him answer it just let him answer, and if not just instruct him not to.

MR. GALLAGHER: Just a moment. I would like to have a conversation with Mr. Giacobbe.

MR. PLAISTED: Sure.

(Short recess.)

MR. GALLAGHER: At this point I would rather [18] the witness not answer the question because of the ongoing criminal investigations and Grand Jury proceedings in Florida.

MR. PLAISTED: Are you instructing him not to answer it?

MR. GALLAGHER: He is not my client, I can't instruct him not to answer it, but I would just prefer that he wouldn't.

Q. Mr. Murphy, are you going to answer my question?

A. No.

Q. And why not?

A. I don't want to.

Q. And what is the reason you don't want to?

A. I am willing to answer questions with regard to Cavanaugh so that this case assists the case against him

but I don't feel I wish to answer questions against other clients at this moment.

Q. And so you will not answer such questions concerning other clients?

A. Correct.

Q. When you say you want to assist the case against Cavanaugh, do you understand that this is a case against Cavanaugh or Brenna?

A. I don't really know much about what is going on.

Q. Where did you get the understanding that this is [19] a case against Cavanaugh or Brenna?

A. After I have been reading all of the Cavanaugh files and transcripts against him I understood it had something to do with him.

Q. You mean in preparation for your testimony here today you arrived at that understanding?

A. Yes.

Q. But you don't have any information that he has any connection to 92 Buena Vista Avenue in Rumson, New Jersey, do you?

A. I have never heard of the address before.

Q. And you don't have any information that would shed light on whether or not 92 Buena Vista Avenue in Rumson, New Jersey, was purchased with the proceeds from drug transactions, do you?

MR. GALLAGHER: Objection, conclusion, but –

A. The only information I know is that Mr. Cavanaugh asked me to wire some funds to his lawyer's office, Mason, Griffin, and which I did.

Other information I have with regard to the house is the fact that I was wiring additional amounts of five thousand dollars up to Mason, Griffin and Mr. Cavanaugh explained to me that this was to do with repairs to the roof, some litigation regarding repairs to the roof.

[20] From that I deduced that he had maybe bought a house up there.

Q. Do you have any firsthand information that he bought a house?

A. I have no such information. I know from general hearsay –

Q. I am going to ask you in terms of hearsay, are you relating hearsay provided to you by Ms. Goodwin?

A. No.

Q. Are you relating hearsay provided to you by Mr. Cavanaugh or Brenna?

A. No.

Q. You have already said that you don't know the source of the money that you wired there, correct?

A. I don't know where it came from other than than it was given to me.

Q. All right.

And you know nothing further about the source of that money other than those facts?

A. Correct.

Q. You don't have any evidence to offer that the house at 92 Buena Vista Avenue, Rumson, New Jersey, that you are unfamiliar with, was used for facilitating drug transactions, do you?

A. No.

[28] * * * * *

Q. Would be originals of documents that you had drafted but no longer had use for?

A. No. All documents that were no longer in use were filed away in the files.

Q. But there was a client who asked you to shred all of his records with respect to his investments?

A. Correct.

Q. And as to this client originals were shredded?

A. Correct.

Q. Were there on occasions times when originals from other clients were shredded for some reason?

A. In one particular case there was.

Q. As you sit here now you don't have total recall of each document that was shredded each day, do you?

A. No, because they were considered waste. The only original documents shredded were some documents in March 1986 relating to Michael Levine, and the only other documents that I am aware of that were originals that were shredded were for this other particular client.

Q. Who was that?

A. Antonio Companys.

Q. How much money did you invest for Mr. Companys?

A. It is very difficult to—

[29] MR. GALLAGHER: Jim, we had a previous discussion about other investments for other people than the people here. I think, I am not certain, but I think there is or at least there may be an investigation of this individual and I think that your questioning here could conflict with that ongoing investigation, and I would rather make the same instruction to Mr. Murphy that I made previously—not an instruction, but a concern that I would rather he didn't answer.

Q. Mr. Murphy, can you tell me without going into any other details about Mr. Companys—perhaps you can answer this "yes" or "no"—did he give you cash to invest for him?

A. The question is did Mr. Companys give me cash to invest for him?

Q. Yes.

A. And the answer is yes.

Q. If you could just give me a number with respect to this question: how many times did Mr. Companys give

you cash that you violated the United States Currency Exportation laws with respect thereto?

MR. GALLAGHER: Jim, I think I have the same objection.

MR. PLAISTED: Even as to just how many times?

MR. GALLAGHER: I think, unless you have a—

[30] MR. PLAISTED: It is referred to in his trial testimony relating to Mr. Brenna and so I would like to at least get the number of times.

MR. GALLAGHER: Can you at least give me a page?

MR. PLAISTED: 40 and 41 where we covered before, that he indicated approximately ten times he violated the Currency Exportation laws.

MR. GALLAGHER: One moment.

(Short recess.)

MR. GALLAGHER: The witness may answer hom [*sic*] many times from what he recalls.

A. I am unable to recollect how many times, if any, for Mr. Companys.

Q. We know it was sometime, correct, once, or do we not?

A. Do we?

Q. I am asking you. Did you ever violate the Currency Exportation laws with respect to the moneys Mr. Companys asked you to invest for him?

A. I am unable to recollect whether I did or not.

Q. Did he ever give you or have delivered to you money delivered in the United States?

A. I am unable to recollect.

Q. You don't know whether he gave you money or where you were when he gave it to you?

[31] MR. GALLAGHER: At this point I think we are getting away from the number and into more of the details, and I think I would make the same statement that I had previously.

Q. Will you answer my question?

A. No.

Q. Will you answer any further questions with respect to the investments you made for Mr. Companys?

A. I prefer not to.

Q. Does that mean you will not?

A. I will not.

Q. How many records did you shred relating to Mr. Companys prior to the search and seizure?

MR. GALLAGHER: I think at this point I will make the same objection and express the same sentiment, that I would rather that the witness not answer.

I feel we are getting away from the scope of our case and into another matter where there is an ongoing investigation.

Q. I take it Mr. Murphy, you will not answer the questions relating to the shredding of documents concerning Mr. Companys?

A. I will not.

Q. You indicated that you shredded documents [32] relating to Mr. Levine, correct?

A. Yes, on one occasion.

Q. And did Mr. Levine request that you shred documents for him?

A. No.

Q. What caused you to shred the documents relating to Mr. Levine?

MR. GALLAGHER: I think I am going to instruct and voice the same concern, that there are ongoing spin-off cases with Mr. Levine, ongoing Grand Jury proceedings and ongoing trials, and I would rather that the witness wouldn't answer.

Q. Will you answer the question, sir?

A. I will not.

Q. Did you shred documents relating to Mr. Levine shortly before the search and seizure by Scotland Yard of your offices?

A. Yes.

Q. Did you shred documents relating to Mr. Levine as a result of your learning of criminal investigations?

MR. GALLAGHER: Same objection and same instruction.

Q. Will you answer?

A. No.

Q. Did you shred documents of Mr. Brenna's[?]

[59] A. Yes.

Q. Is it written?

A. It is.

Q. Do you have a copy of it?

A. No.

Q. Does the Federal Government have a copy of it?

A. Yes.

MR. PLAISTED: Can I have it?

MR. GALLAGHER: I suppose so.

I don't have a copy of it. I will make an inquiry and in response to your request I will provide a written response; is that okay?

MR. PLAISTED: All right. We don't need to belabor or argue about whether it has been requested before.

MR. GALLAGHER: Certainly.

Q. Now, as part of your agreement you are not going to be prosecuted, correct; is that your understanding?

A. Yes, there was an agreement which allowed for that.

Q. And your understanding is that the United States Federal Government will not prosecute you in connection with criminal violations of its laws that you have committed, correct?

A. Correct.

[60] Q. And what do you do in return?

A. I agree to cooperate.

Q. And what does that mean, "cooperate"?

A. I agree to cooperate fully with them as and when they require my cooperation.

Q. And to appear in proceedings like this; is that correct?

A. Yes.

Q. Is this an appearance pursuant to your agreement?

A. It is.

Q. And did you understand that your cooperation would be in criminal investigations and cases when you entered into it?

A. Yes.

Q. And did you prior to when we sat down here today assume that this was part of a criminal proceeding?

A. No.

Q. When did you learn it was not part of a criminal proceeding?

A. About two months ago.

Q. Do you understand that there is an ongoing criminal investigation relating to Mr. Brenna-Cavanaugh?

A. Yes.

Q. And are you cooperating in that criminal [61] investigation, as you understand it?

A. Yes.

Q. And what, if anything, do you understand from your conversations with Agents that this case has to do with the investigation of Mr. Brenna?

A. I understand that the moneys I forwarded up to lawyers on instructions from Mr. Brenna was used to purchase the property they are trying to seize.

Q. And you learned that from the Agents?

A. I did.

Q. You don't have any independent knowledge that the money that you forwarded to New Jersey was even used for a house purchase, do you?

A. I do not have any direct knowledge of that.

Q. And did you ever learn that Brenna had a girl friend, so to speak, in the United States?

A. I did.

Q. Did you learn that from the Agents as well?

A. No.

Q. Who did you learn that from?

A. Hearsay.

Q. From whom?

A. I do not recollect.

Q. So you can't identify who told you he had a girlfriend in the United States?

[62] A. I can't.

Q. Did you ever hear that his girl friend in the United States left him high and dry, so to speak?

A. No, not hight [*sic*] and dry. I heard she had expensive tastes.

Q. Did you ever hear that she left him high and dry?

A. Can you define "high and dry"?

Q. Do you know what thatmeans [*sic*]?

A. No, financially, emotionally?

Q. Have you ever said to anybody that Brenna's girl friend left him high and dry?

A. No.

Q. Did you cover in your taped conversations with the Federal Agents the topic of Mr. Brenna-Cavanaugh?

A. Yes, certainly.

Q. And did you cover the wire transfers to New Jersey that you made at his instruction?

A. Maybe.

Q. And is the only way to determine that by a review of the transcripts and the tapes?

A. Yes, I covered all matters that were of interest to Customs so I certainly covered the moneys given to me in St. Thomas.

MR. PLAISTED: And may I have those tapes or [63] transcripts?

MR. GALLAGHER: They are not in my possession. I will consider the request and provide a response.

I don't have tapes or the transcripts.

A. The transcripts were given I think to Mr. Black in the criminal proceedings down in St. Thomas.

Q. The complete transcript?

A. Not in the first case but in the second case, excerpts that relate to Mr. Cavanaugh.

Q. Did you review those transcripts before they were provided?

A. Yes.

Q. Were they accurate reflections of what you previously said relating to Mr. Brenna?

A. They were very brief summaries of my transactions with Mr. Brenna.

Q. Did you accurately relate the facts pertaining to Mr. Brenna as you understood them at the time you made those tapes?

A. In a tracy form, yes.

Q. When you say "tracy" you mean summary form?

A. Summary form.

Q. You did not purchase any boats for Mr. Cavanaugh-Brenna, did you?

A. I arranged for—

[64] Q. Did you purchase any? I would appreciate a "yes" or "no" answer.

A. I did not pay for any boats for Mr. Cavanaugh, no.

Q. Can you answer asto [*sic*] whether you purchased any boats for Mr. Brenna in a "yes" or "no" fashion?

A. A company that I formed for Mr. Brenna purchased a boat from another company.

Q. Did you ever tell anybody that you did not purchase any boats for Mr. Cavanaugh-Brenna?

A. The question is a little technical. As the question is technical, I might have.

Q. You might have said that?

A. The word "purchase" having different connotations.

Q. So you might have said, "No, I didn't purchase any boats for Mr. Cavanaugh-Brenna to Agents in the past?

A. I might have said that.

Q. Is it true that you did not purchase any boats for Mr. Cavanaugh-Brenna?

A. It is true that I did not purchase in the form of paying for them in cash, but it is true that I did purchase them because I effected the transfer of them.

The word "purchase" is the key word.

[65] Q. When you say you effected the transfer does that mean that you had them registered?

A. I did.

Q. Is that what you mean?

A. No.

Q. Did you tell anybody in the past that what you did for Mr. Brenna in connection with boats was to register them?

A. Yes.

Q. Was that accurate?

A. Yes.

Q. Did you actually purchase boats for other of your clients?

A. Again, is it possible for you to define "purchase" by way of transfer, or actual paid in cash?

Q. Did you ever have anything to do with boats for any of your other clients beside Mr. Brenna?

A. Yes.
Q. How many, approximately?
A. Forty, approximately.
Q. And what were your, what role did you play in connection with boats for other clients besides Mr. Brenna?
A. In certain cases I would purchase in so much as I would pay the cash for boats on behalf of clients and I would also purchase boats where there would be [66] no consideration involved.
Q. When you say "purchase them where there would be no consideration" what do you mean?
A. I would buy them from another company but I would not pay the other company for the boat.
Q. So you would effectuate a transfer for the client?
A. Correct.
Q. And did you do that with other assets of your clients beside boats, like houses, for instance?
A. Not as far as I can recollect.
Q. Did you do any other assets—
A. Oh, I beg your pardon, may I retract that? Yes I did purchase houses for other clients.
Q. And I take it you would handle all sorts of assets for other clients?
A. I would handle many assets for other clients, correct.
Q. Did you ever hear that Mr. Brenna's girl friend and he had broken up, so to speak?
A. No.
Q. Did you ever tell anybody that their relationship had terminated, in so many words?
A. No, I knew very little about their relationship.
Q. And what you heard you heard from some [67] unidentified third party?
A. Yes.

Q. What it a Federal Agent?
A. No.
Q. Did you ever charter boats for different clients?
A. Yes.
Q. Did you ever register or transfer registrations for different clients of different boats?
A. Yes.
Q. Did you ever have other transactions in connection with these forty or so boats that you dealt with for clients besides what we have already covered?
A. The question is very, very general.
Q. Can you describe to me what else you did with boats for clients?
A. I purchased them, I sold them, I chartered them; that's about all you can do with boats.
Q. So whatever one can do with boats you did for clients?
A. Probably.
Q. Did you keep them all in any particular harbor when you were handling them for clients?
A. No.
Q. Did you take responsibility for boats that were maintained on Tortola for some clients?
[68] A. Yes.
Q. Approximately how many during the course of the six or so years—
A. Ten, fifteen.
Q. And I take it this was on behalf of a number of different clients, it wasn't all one client with forty or so boats?
A. Correct.
Q. Was there anything illegal about what you did with boats for clients?
A. No.
Q. Did you—

MR. GALLAGHER: Objection to the last question, conclusion.

Q. Are there any legal justifications that you thought existed for your accepting currency in the United States and not reporting it?

MR. GALLAGHER: Objection, conclusion.

He may answer.

A. No.

Q. Did you ever tell Agents that there were such justifications?

A. You asked me whether there are justifications to break the law that I knew that existed and the answer is no.

[69] Q. Did you ever tell Agents on a tape or otherwise that at the time you were doing it you thought there were such justifications?

A. No.

Q. Did you ever know a gentleman by the name of Moreno?

A. I am not sure whether I heard the name before or after my arrest in March of 1986.

Q. If you heard it after, you heard it from the Agents?

A. Correct.

Q. Did you know a Mr. Moreno before 1986? if you can recall.

A. Yes, I did, I met somebody who said to me that was his name Moreno.

Q. Did he deal in boats?

A. Yes.

Q. Did he have a boat business in Anguilla?

A. Yes.

Q. Did you ever have any illegal transactions with Mr. Moreno, as far as you know?

A. No.

Q. Did you ever buy any boats from Mr. Moreno?

A. For, or from?

Q. For or from?

[70] A. Yes.

Q. Which, for, or from?

A. A boat called "Topsail Traveler".

Q. And did you buy it for, or from, him?

A. Both.

Q. You effectuated a transfer for him?

A. Yes.

Q. And so far as you know there was nothing illegal about that transaction, correct?

A. Correct.

Q. So far as you know there wasn't anything illegal about any of your boat transactions, correct?

A. Cor[r]ect.

MR. GALLAGHER: Again, the same objection.

As far as he knows—all right, I withdraw the objection.

Q. As you understand it from your conversations with the Agents do the proceedings in this case relate to the criminal investigation of Mr. Brenna?

A. Yes.

Q. How so?

A. How so?

Q. What is your understanding?

A. I was told that Mr. Brenna is a drug smuggler and that the proceeds from this were given to me and [71] used to purchase the house.

Q. The Agents told you that?

A. Correct.

Q. And do you understand that the evidence gathered in the course of this particular case may further the investigation of Mr. Brenna?

A. I don't know, I'm not sure if I understand the question or if I don't know.

Q. Do you understand that this case is part and parcel of the criminal investigation of Mr. Brenna, in your mind?

A. Whether it is or not in my mind, it is all one.

Q. And in terms of all of one then you are aiding this investigation; is that correct?

A. Yes.

Q. Pursuant to your agreement?

A. Yes.

Q. Have you ever been told that there was a search of this property at 92 Buena Vista Avenue?

A. No.

Q. Do you know a Mr. Mazacco?

A. Could you spell that, please?

Q. M-A-Z-O-C-C-O?

A. No.

Q. Or M-A-Z-O-C-C-A?

[72] A. Never heard of a name like that.

Q. Mr. Brenna-Cavanaugh never spoke to you about a Mr. Mazacco?

A. No.

Q. What are the criminal offenses you understand you will not be prosecuted for by the Federal Government in connection with your agreement?

A. It is my understanding that I will not be prosecuted for any offenses save murder, as I was led to believe, though I believe in fact wrongly, unless I at some stage refuse to cooperate or am found lying.

Q. And what are the offenses that you understand you committed that you won't be prosecuted for?

A. I'm not a lawyer, but I understand that it is something to do with conspiracy.

Q. To do what?

A. Drugs, drug related conspiracy, exchange control regulations, and that's all that I am aware of that I have of crimes I have committed.

Q. When you say conspiracy to commit drug transactions, haven't you told us and testified that you had no idea before the search and seizure that any drugs were involved in this?

A. I have said that.

Q. Is that true?

A. Yes.

[73] Q. Has somebody told you that you can be prosecuted for an offensethat [*sic*] you had no idea has been committed?

A. Yes.

Q. Who told you that?

A. Various DEA Agents and Scotland Yard, and I believe that.

Q. And because of what they have told you, you have entered into this agreement to cooperate?

A. Yes.

Q. Did you ever consult with your own attorney as to whether you could be prosecuted for offenses that you had no idea were being committed?

A. No I did not.

Q. Did the DEA Agents ever tell you what the exposure for these drug offenses that you didn't know were being committed would be on your behalf?

A. They intimated to me that I would be in a lot of trouble.

Q. And did they tell you for what period you could go to jail for these drug offenses that you didn't know were being committed?

A. No.

Q. Did you understand it could be life?

A. No.

* * * * *

[83] Q. During the time that you were unemployed after April 1986 for that year, that first year—

A. Nine months.

Q. Whatever the time is, during the period until you gained employment was the Federal Government providing you money upon which you were living and paying your living expenses from April 1986 until you became employed?

A. I refuse to answer that question.

Q. On what basis?

A. I'm not going to answer your question.

Q. How much money has the Federal Government provided to you in connection with your cooperation on this case and other cases?

A. I will answer that question.

Q. Thank you.

A. The Federal Government has paid me approximately $30,000 from March of 1986 until the present date.

Q. Did you pay out of your pocket your travel expenses to come here, for instance?

A. I did.

Q. And do they reimburse you for that?

A. They do, they will.

[84] Q. Do you include expenses such as that within your $30,000 figure?

A. I do.

MR. PLAISTED: Can I get an itemized list of those expenses and payments?

THE WITNESS: No.

MR. PLAISTED: Rather than asking the witness, from you, Mr. Gallagher?

MR. GALLAGHER: First of all, I certainly don't have it. I don't know if I am going to provide it.

Let me think on that one, Jim. That's out of left field.

Q. Mr. Murphy, I take it you do not want him to provide the list of your payments from the Federal Government?

A. Correct.

MR. GALLAGHER: The only difficulty I would have is, off the top of my head, that it might provide some sort of idea of where he currently is, and that's definitely one thing I don't want to do.

MR. PLAISTED: A list I don't think would do that.

MR. GALLAGHER: I don't know if it [85] will, but I will respond to you at a later date.

Q. I take it in terms of probing the details of the payments to you from the Federal Government, Mr. Murphy, that you don't plan to answer those questions if I ask them; is that correct?

A. Correct.

Q. Did you ever say to any Federal agents in tape recorded conversations that there was in substance, nothing wrong with your transactions with Brenna?

A. I do not recollect.

Q. You may have said that at some point in time?

A. I may not have, I may have.

Q. And if you did say it was it truthful at the time you said it?

A. If I did say that my transactions with Brenna were legal was it truthful?

Q. Yes, were you intentionally lying if you said that, or was it a mistake, or you just don't know?

A. It would have been a mistake to say that.

Q. So why would you have said it, why do you think you might have said it?

MR. GALLAGHER: Objection. There is [86] no testimony that he might have.

Q. So far as you—

A. I might have, I might not have.

Q. So far as you know you might have, you might not have, you have no idea?

A. I do know that my transaction with Mr. Brenna broke the law so, therefore, if I said I didn't break the law then I was lying.

Q. You also believed that taking money from the American Virgin Island[s] to the British Virgin Islands was a violation of the American Criminal law?

A. I'm not sure whether I knew it was criminal or civil, but I was aware that it was breaking a law somewhere.

Q. You have no idea whether it was simply breaking a regulation, or a criminal law?

A. Correct.

Q. For all you knew at the time you did it, it was a civil violation rather than a criminal violation?

A. I thought it was just a reporting requirement.

As you must understand, other countries do not have such laws.

Q. When you say you thought it was simply a reporting requirement you mean simply a [87] regulation that did not have criminal sanctions?

A. Correct, the basis for that is that the Virgin Islands, England and half of Europe, do not have such laws.

Q. So at the time that you took money from the American Virgin Islands to the British Virgin Islands you did not realize it was a violation of a criminal statute?

A. Correct.

Q. And then I presume that during that period of time until the search and seizure in April of 1986 you did not believe that you were violating any criminal statutes; is that correct?

A. Yes, it is correct, I was not until the DEA told me the penalties for violation the statutes that I realized it was quite serious.

I could not understand why such a small thing could be so serious.

Q. When you sent money into the United States did you satisfy the reporting requirements?

A. On the majority of times, yes.

Q. Did you ever say to Federal agents that you always satisfied reporting requirements when you sent money into the United States?

A. Carried money in, I probably did say that, yes.

[88] Q. And when you wire transferred money in did you similarly satisfy reporting requirements, if there were any?

MR. GALLAGHER: Objection, I think you can ask the witness what he did when he wired money, whether—as to whether or not the witness, you know, as a practical matter you and I know what the reporting requirements are wire transfers.

MR. PLAISTED: You may know, I am not necessarily sure I know.

MR. GALLAGHER: There are none, my objection to your question is that it assumes a fact that is not true or seem to be—

Q. Did you as you understand it when you wire transferred money into the United States, did you have any reporting requirements?

A. I don't think anyone thinks that there are any reporting requirements when you wire funds into the United States, and, no, I did not.

Q. So at the time you wired transferred money for Mr. Brenna into the United States you did believe [*sic*] you had any reporting requirements, correct?

A. Correct.

Q. As you sit here today you still do not [89] believe you had any reporting requirements with respect to the money that you sent into the United States for Mr. Brenna?

A. Correct.

Q. [A]nd in fact there wasn't anything improper with your wiring money into the United States for Mr. Brenna, was there?

A. No, there was not.

Q. And you have never thought that your wiring money into the United States for Mr. Brenna was a part of a drug enterprise?

A. No.

Q. And you don't today, do you?

A. No, I do not.

MR. PLAISTED: Mr. Gallagher, I'm still in the position I was before, which is I don't see how this witness does anything other than help Ms. Goodwin's case.

I don't know why you think he does anything else, and so I would ask that you elicit what you think furthers your case so that –

MR. GALLAGHER: Are you saying you are done with your direct examination?

MR. PLAISTED: I can go on in terms of

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil 89-1411

UNITED STATES OF AMERICA

v.

A PARCEL OF LAND, BUILDINGS, APPURTENANCES AND IMPROVEMENTS KNOWN AS 92 BUENA VISTA AVENUE, RUMSON, NEW JERSEY

Deposition of RICHARD N. GIACOBBE, taken at the offices of the United States Attorney for the District of New Jersey, 970 Broad Street, Newark, New Jersey, on June 27, 1989, commencing at about ten-thirty o'clock in the forenoon, before William Sokol, a Notary Public and Certified Shorthand Reporter of the State of New Jersey.

APPEARANCES:

SAMUEL A. ALITO, JR., ESQ.
UNITED STATES ATTORNEY FOR THE DISTRICT OF NEW JERSEY,
By: JEROME MERIN, ESQ., and
NEIL R. GALLAGHER, ESQ.,
ASSISTANT UNITED STATES ATTORNEYS
For the Government.

WALDER, SONDAK, BERKELEY & BROGAN
By: JAMES A. PLAISTED, ESQ.
For Claimant.

[3] (Exhibits CG 1 through CG 16 marked for identification.)

RICHARD N. GIACOBBE,

being first duly sworn testified as follows:

DIRECT EXAMINATION

BY MR. PLAISTED:

Q. Mr. Giacobbe, what is your present employment?

A. With the Drug Enforcement Administration.

Q. What is your position there?

A. Special Agent.

Q. How long have you been a Special Agent for the Drug Enforcement Administration?

A. A little over 3 years.

Q. Where were you before that?

A. I was a police officer.

Q. And where were you a police officer?

A. In Morris County, New Jersey.

Q. And how long were you a police officer in Morris it County?

A. Approximately 5 years.

Q. What town were you an officer with?

A. Mount Arlington Police Department.

[19] * * * * *

Q. And then there came a time when an agreement was made with her attorney whereby you took her testimony under oath and pursuant to an immunity agreement, correct?

A. Yes.

(Exhibit CG 17 marked for identification.)

Q. I show you what has been marked as exhibit CG 17.

Can you identify that?

A. Yes.

Q. And what is it, that document?

A. A document consisting of 1 hundred 14 pages of questions and answers that pertain to Beth Ann Goodwin/Shurack.

Q. Did you play a hand in preparing CG 17?

MR. MERIN: Objection as to form.

MR. GALLAGHER: Can you be a little more specific?

Q. Did you prepare that transcript that appears before you and is numbered CG 17?

MR. MERIN: Objection as to form.

[20] Are you asking if he prepared the transcript, or if he participated in taking the transcript?

MR. PLAISTED: The witness can say if he doesn't understand but I will rephrase it.

Q. Did you have a hand in preparing that document, the transcript, that has been marked CG 17?

MR. GALLAGHER: Objection.

Do you understand the question?

A. No, I don't know if it pertains to did I help prepare the questions or did I help transcribe it,

Q. Did you review the tape and review that transcript at some point in time before it was prepared in its final form?

A. Yes.

Q. Did you make alterations to the transcript where you thought the words should be more properly reflected –

A. Myself and Special Agent Lohr reviewed the tape and prepared the transcript.

Q. And you made corrections where you thought it was appropriate?

A. Yes.

Q. Is CG 17 an accurate reflection of the tape of your immunized interview with Beth Ann Goodwin?

[21] A. Yes.

Q. Now, at the time that that transcript was taken had Joseph Brenna been tried on criminal charges?

A. I don't recall before or after.

Q. Well, did you continue to investigate Ms. Goodwin and Mr. Brenna on transactions relating to 92 Buena Vista Avenue after his trial?

MR. MERIN: Could we establish a date for the trial?

MR. PLAISTED: If the witness knows, or if you know.

MR. MERIN: I'm not testifying. You are asking the question.

MR. PLAISTED: Please read the question back.

(Record read.)

A. Is your question, did I continue to investigate Beth Ann and Brenna pertaining to just money transactions pertaining to 92 Buena Vista Avenue after this?

Q. Did you attend the trial when Mr. Brenna was tried?

A. First trial?

Q. Yes.

A. Yes.

[22] Q. Was there a second trial?

A. Yes.

Q. And did that second trial get tried to a conclusion?

A. I don't believe it went to trial, I think there was a plea.

Q. Did he plead before they began the actual trial?

A. Yes.

Q. Did this transcript with Beth Ann Goodwin take place before the first trial, or after the first trial?

A. I don't recall. If you can get me the—

Q. As you sit here now you have no idea whether you took her immunized statement before, or after, the trial of

Mr. Brenna on money laundering charges?

A. I can't recall.

Q. But in any case, you took her immunized statement before the second proceeding when he pled guilty; is that correct?

A. I don't recall.

Q. So you don't recall whether you took her statement before or after he pled guilty either?

A. That's correct.

[23] Q. If you took this transcript after he pled guilty what was your purpose in immunizing her and taking this transcript?

MR. GALLAGHER: Objection. One moment.

MR. PLAISTED: Are you instructing him not to answer?

Can we just speed it up?

MR. GALLAGHER: You are probably going to have it over before the Magistrate. I want to preserve the record.

That's the reason for me making the objection and taking the time.

MR. PLAISTED: Let me get a cup of coffee. I will use the time usefully.

(Discussion off the record between the witness and government counsel.)

MR. MERIN: We are going to object to the question because as it is phrased now it is speculative and the initial question begins with "if something occurred, "which the witness already testified he doesn't know is the case, "then why did you do something"?

MR. PLAISTED: Are you instructing him not to answer?

MR. MERIN: On the question as presently [24] posed, yes. If you rephrase it we will reconsider.

Q. What was your purpose in taking testimony from Beth Ann Goodwin on approximately May 5, 1988?

A. To develop additional information on the illegal narcotic activities of Joseph Anthony Brenna.

Q. Did the government enter into a plea agreement with Mr. Brenna?

A. I had no involvement with that, that's a United States Customs case.

Q. You were the case agent on the DEA investigation of Brenna, though; is that correct?

A. Of the drug activity of Joseph Anthony Brenna, correct.

Q. Do you know if there is a plea agreement with Brenna which prevents you from prosecuting Brenna further?

A. I don't believe there is.

Q. Well, how would you know that if you didn't—did you obtain a copy of the plea agreement?

A. No.

Q. Do you believe you presently have an investigation with Mr. Brenna?

A. Yes.

Q. Do you have any idea whether there is a plea agreement in place which affects your ability to

[43] * * * * *

Q. Meaning this trial, criminal 87-157 and the charges in that trial?

A. Yes.

Q. If you could look at CG 2, the answers to interrogatories that you provided, did you interview—and if you can answer this yes or no I would appreciate it—Lois Geiling?

A. I believe I was present during the interview.

Q. Who else interviewed Lois Geiling?

A. Agent Janet Lohr from the Internal Revenue Service.

Q. Did you interview William Kirkpatrick?

A. I was present during the interview.

Q. Did you interview Joseph Mazacco?

A. Yes.

Q. Did you interview Shaun Murphy?

A. Yes, I have.

Q. How many times did you interview Lois Geiling?

A. I don't recall.

Q. How many times did you interview William Kirkpatrick?

[44] A. I don't recall.

Q. How many times did you interview William Mazacco?

A. A few times.

Q. When you say "a few", approximately how many?

A. Less than 7.

Q. How many times did you interview Shaun Murphy?

A. Pertaining to what?

Q. Pertaining to anything related to Brenna, Goodwin and 92 Buena Vista Avenue.

A. Several times.

Q. When you say "several", approximately how many?

A. Less than 10.

Q. Did you make reports of your interviews of Lois Geiling? Yes, or no, if you can.

A. Repeat the question.

Q. Did you make a report or reports of your interviews of Lois Geiling?

A. There were reports made.

Q. Did you play a role in creating those reports?

A. I don't know if I wrote that report or Agent [45] Lohr did.

Q. But there is a report of that interview in existence?

A. Yes.

Q. And it is part of your DEA file?

A. Correct.

Q. Is there a report of your interview of William Kirkpatrick?

A. I believe that there is.

Q. And that is contained in the DEA file?

A. Correct.

Q. And is there a report of your interview of Joseph Mazacco?

A. Yes.

Q. And is that in the DEA file?

A. Yes.

Q. How many such reports are there of your interviews of Mr. Mazacco?

A. As many times as I interviewed him.

Q. Each time you interviewed him you wrote a separate report?

A. Yes.

Q. Is there a report of your interviews with Shaun Murphy?

A. There are some.

[46] Q. How many such reports are there of Mr. Murphy, relating to Mr. Murphy and Goodwin, Brenna, Buena Vista Avenue?

A. Several.

Q. When you say "several", approximately how many?

A. Less than 10.

Q. But 3 or more, when you say "several" does "several" mean 3 or more?

A. Leave it as less than 2—I don't recall, it could be 2.

MR. GALLAGHER: 1—

Q. Several means 2 or more then?

A. If you want to say that.

Q. I am asking you what you mean.

A. My answer is 10 or less.

Q. But you certainly mean when you say "several" that there are 2 or more as well, correct, "several" doesn't mean one, does it?

A. Delete several and say less than 10.

Q. So when you said there were several as to Mr. Mazacco you meant there could have been one?

MR. GALLAGHER: Objection.

MR. MERIN: May I make a suggestion?

MR. PLAISTED: Gallagher suggested to him [47] that he say one; that's a goofy suggestion and I want to tie this down.

MR. MERIN: I presume for your purposes you want to know the number of reports and then you are going to make a motion—

MR. PLAISTED: In part.

MR. GALLAGHER: He will give a clarification.

He is having difficulty with the question as phrased.

A. There are several reports pertaining to Joseph Mazacco, and there are less than 10 reports pertaining to Shaun Murphy, of 92 Buena Vista.

Q. Goodwin or Brenna?

A. Right.

Q. When you say "several "I assume you mean 2 or more; is that correct?

A. Yes.

Q. And who is Joseph Mazacco?

MR. GALLAGHER: One moment please.

(Discussion off the record between the witness and government counsel.)

A. He is an associate of Joseph Anthony Brenna.

Q. Now, you have identified in these answers to interrogratories those 4 people as people from whom [48] you obtained statements; is that correct?

A. Yes.

Q. Have you interviewed anyone else that the DEA will rely on as a witness in this case to prove this forfeiture action?

A. No, I don't think so, those are the names that pertain to this aspect of the investigation.

[52] * * * * *

MR. GALLAGHER: First of all, there is not a conference after every question. That is not true either.

We are not pointing him out to different portions to read and we are not putting words in his mouth. Nothing like that is going on and I resent your accusation that that is going on.

Q. Let me rephrase the question.

Are there any other individuals other than those identified in question number 3 in your answers to interrogatories and Beth Ann Goodwin who have evidence in this case that you know of?

MR. GALLAGHER: Objection to the word "evidence". That calls for a conclusion.

MR. PLAISTED: Can he answer?

MR. MERIN: I am instructing him not to answer this question as phrased. If you wish to rephrase the question we will reconsider the objection.

Q. Is there anybody else you can identify other than the 4 people listed in interrogatory 3 and Beth Ann Goodwin who have knowledge relevant to this case?

A. Yes.

Q. Who?

[53] MR. GALLAGHER: Objection.

Q. Who?

MR. GALLAGHER: You may answer.

A. To the best of my knowledge there is Special Agent Janet Lohr of the Internal Revenue Service.

Q. Okay. Yourself, I assume?

A. Of course myself.

Q. Anybody else?

A. They may have vague information pertaining to this, the Customs Agents.

Q. Who are they, as best as you can recall?

A. Lynch and Romney.

Q. Anybody else?

A. Agents that have worked on the investigation to assist me.

Q. Are there any names that you can presently offer of those agents?

A. Names that assisted me on this investigation, Agent Moon, and that would be it.

Q. Anybody else other than the people you have named?

A. Law enforcement agencies.

Q. Anybody else?

Your answer is no one else that you can presently think of?

[54] A. That's correct.

Q. Do you have Mr. Mazacco's present address?

A. No, sir.

Q. Do you know where he presently works?

A. No, sir.

Q. Is that information contained within the DEA files?

A. No, sir.

Q. Is he available to be called as a witness in this case, so far as you know?

A. That's up to his attorney, sir.

Q. So you believe he is available through his attorney?

A. Yes, sir.

Q. Has he worked out any kind of plea agreement?

A. Yes, sir.

Q. Has he pled guilty?

A. No, sir.

Q. What is he to plead guilty to?

A. Unknown, sir.

Q. Is that information contained within the DEA files?

A. No, sir.

* * * * *

[70] Q. What drug transaction was the 2 hundred 40 thousand dollars referred to in paragraph 5 produced by?

MR. GALLAGHER: One moment, please.

(Discussion off the record between government counsel and the witness.)

MR. GALLAGHER: The witness may answer.

A. Just repeat that.

(Record read.)

A. Approximately at the end of 1981, 1982, beginning of 1982, Brenna organized a shipment of marijuana into the United States.

Q. Where did that shipment go to?

A. Into the United States.

Q. Where in the United States?

A. It either went to Southern Florida or the [71] northeastern portion of the United States.

Q. What boat was it shipped on?

A. I can't recall.

Q. Who manned the ship that the alleged marijuana was shipped into Southern Florida or the northeastern portion of the United States?

A. I don't think the captain's name was disclosed.

I don't have my reports in front of me and we are going back to the very beginning of the years and I haven't reviewed them all recently and I can't recall the exact details pertaining to the captain and the M.O. of the importation.

Q. What was the volume of the shipment of the drugs that produced these funds?

A. Multi-tons of marijuana.

Q. How much money did Brenna get from that shipment in 1981 or 1982?

A. I have no idea how much Mr. Brenna made.

Q. Where did the marijuana that you say was shipped into Southern Florida or the northeastern part of the United States come from?

A. The exact location I don't know.

Q. Do you know an inexact location?

A. South America.

Q. Is that as finite as you can be in terms [72] of the source of this marijuana?

A. Yes, usually narcotics do come from South America.

Q. Are you relying on anything else specifically other than the fact that you believe that –

A. It is where the organization has been importing their marijuana from.

Q. What date did Brenna sell this alleged shipment of marijuana?

A. I have no idea when the marijuana sold.

Q. What amount of money was given to him on the date of the sale?

MR. GALLAGHER: Objection, I think that's been asked and answered.

MR. PLAISTED: No, I don't think it was.

A. I have no idea how much money Mr. Brenna made or was paid to bring this marijuana into the U.S.

Q. Where was the location that he was given the money for this shipment of marijuana?

A. Again, I have no information pertaining to how much money Mr. Brenna was paid for it.

Q. Where where did he receive it?

A. I have no idea.

Q. Who gave him this money for this shipment [73] of marijuana?

A. No idea.

Q. Who was the person who gave him this marijuana that was shipped to Southern Florida or the northeastern part of the United States?

A. Those individuals have not been identified at this time.

Q. When Brenna allegedly received this money for this marijuana where did he put it immediately after receiving it?

A. I have no idea how much money Mr. Brenna received for bringing this marijuana into the US.

Q. Where did he put this unknown amount of money that he received after receiving it?

A. Cash that Mr. Brenna did move offshore was moved to the British Virgin Islands.

Q. How do you know that he was actually paid in cash by the person who bought this marijuana?

MR. GALLAGHER: Objection, I think I am going to direct the witness not to answer.

MR. PLAISTED: Basis?

MR. GALLAGHER: Work product, investigatory privilege. How did he know, is the question.

Q. Does any of this information that you have [74] just set forth come from the 4 witnesses that you have identified as the firsthand witnesses in this case?

A. Which 4?

Q. Did any of the information which you just gave us about the 2 hundred 40 thousand dollars and the marijuana shipment come from Geiling, Kirkpatrick, Mazacco or Murphy?

A. Yes.

Q. From whom?

MR. GALLAGHER: Objection. Direction not to answer on the basis of work product, investigatory privilege.

Q. Did Geiling give you any information about this alleged drug shipment?

(Discussion off the record between government counsel and the witness.)

MR. GALLAGHER: There was a question about 2 questions back in which you asked him as to who gave him certain information. Would the reporter repeat that question? We might permit him to answer it.

MR. PLAISTED: Can I re-pose it rather than search?

Q. Did Geiling give you any information about drug transactions?

[75] A. No.

Q. Did Kirkpatrick give you any information about drug transactions?

A. No.

Q. Did Shaun Murphy give you any direct information about drug transactions?

A. No.

Q. So all the information that you related to us came from whom about this drug transaction?

A. Drug transaction?

Q. The reference in paragraph 5 of the complaint.

A. Joseph Mazacco.

Q. Did Mr. Mazacco witness the transfer of funds in this matter, as you understand it?

MR. MERIN: Objection, work product. If you want to find out–

MR. PLAISTED: I am asking for this man's state of knowledge as the signer of the affidavit.

Are you instructing him not to answer?

MR. GALLAGHER: Yes.

Q. Did you record exactly what Mr. Mazacco told you in terms of this drug transaction in 1981 or 1982 in a report of interview?

A. I believe you already asked me this question [76] earlier this morning.

Yes, there is a report made.

Q. The answer to my question is "yes"?

MR. MERIN: Yes.

Q. Now, could you set forth for me all of the facts you can now recall that underlay and supported your statement that Beth Ann Goodwin purchased the house on Buena Vista Avenue as a nominal party for Joseph Brenna?

MR. GALLAGHER: One moment, please.

(Discussion off the record between government counsel and the witness.[)]

MR. GALLAGHER: As I did earlier, I am going to instruct the witness not to answer.

MR. PLAISTED: What is the basis?

MR. GALLAGHER: Work product, investigatory privilege.

Q. Is there a cooperation agreement with Mr. Mazacco?

MR. GALLAGHER: Jim, if I could just point out one thing that perhaps might help, I would not object to you asking, for example, with Beth Ann Goodwin, I would not object to you asking something along the lines of, what is the basis–

MR. PLAISTED: I did, I said factual [77] basis.

MR. GALLAGHER: I believe there is a difference between the factual basis and the basis.

The factual basis are the facts themselves and I believe that those as developed by our investigator are work product; however, the basis, the source, is not.

Just as we refuse to disclose the actual interviews in our interrogatories, we named the people that were interviewed–

MR. PLAISTED: Suggest the question and I will ask it that he will be allowed to answer.

MR. MERIN: The factual basis is laid out in the affidavit. If you want to ask him the source of the facts we have no objection.

Q. Who told you that Beth Ann Goodwin was a nominal party for Joseph Brenna in the purchase of Buena Vista Avenue? if anybody.

A. I don't believe Beth Ann Shurack's name was specifically mentinoed, just that there would be a female for the money to be wired to in New Jersey.

Q. Can you tell me who, if anybody, told you that Beth Ann Goodwin was acting as a nominal party for Brenna in the purchase of Buena Vista Avenue?

MR. MERIN: In those words?

[78] A. At this point I can't recall which witness, who exactly said what.

Q. Mr. Murphy did not tell you that Beth Ann Goodwin was a nominee for Joseph Brenna, did he?

A. At the time of the investigation Beth Ann Goodwin's name was not known, she was a female living in New Jersey.

Q. Mr. Murphy has never said to you that Beth Ann Goodwin was Brenna's nominee, has he?

A. Those exact words, no.

Q. You said somebody told you something about wiring money to a person in New Jersey; what is it that was told to you?

MR. MERIN: If you wish to know who it was we have no objection.

If you wish to have us characterize what was said by a person we will object.

We do not think it appropriate to have this witness either regurgitate or characterize the testimony of third

parties he spoke to. We will give you the names of the people, the witness is prepared to give you the documents, the witness is prepared to give you that line of information, so you know where our objections are coming from.

Q. Does Mr. Mazacco have a cooperation [79] agreement with the United States?

A. Yes, he does.

Q. Does he make himself available to you when you need to interview him because of that cooperation agreement?

A. He will make himself available if we want to interview him.

Q. Can you arrange to have him produced for a deposition?

MR. MERIN: Yes.

Q. Has Mr. Mazacco met Beth Ann Goodwin?

A. Should I answer that question?

MR. GALLAGHER: No, I will direct the witness not to answer. Work product.

Q. Have you shown Mr. Mazacco a photo spread relating to Beth Ann Goodwin?

A. No.

Q. Can you set forth for me the factual basis for your statement that Beth Ann Goodwin has no visible means of support?

A. If you would refer to her interview by myself and Agent Lohr, her own statements made by her—and I believe there is an IRS form that Agent Lohr has given you.

Q. Didn't Beth Ann Goodwin tell you that she [80] was supported by Brenna during that period, most of that period?

MR. MERIN: Objection, argumentative.

MR. PLAISTED: I am asking.

MR. MERIN: I will instruct the witness not to answer. It either is or isn't in the transcript.

Q. CG 17, was that transcript taken in part to aid the case against Mr. Brenna that was pending in the Virgin Islands?

A. Already been asked by you earlier this morning.

Q. I appreciate your observations, if you could just answer the questions and quit arguing we will go faster.

MR. MERIN: Objection to that characterization.

MR. PLAISTED: The witness keeps telling me that I am asking questions that have already been asked, which isn't the—

MR. GALLAGHER: You asked that question this morning.

MR. PLAISTED: I didn't ask that question. I would ask for an answer to that question or an instruction not to answer; let's move along.

MR. MERIN: Could you keep your voice [81] down?

MR. PLAISTED: I haven't raised my voice.

Why do you need 2 government lawyers and all of the conferences? You can say in 2 words simply, objection, don't answer. I would appreciate it if we can confine it to a proper deposition format.

I would ask for either an instruction not to answer or an answer to the question.

(Record read.)

A. I can't recall whether this interview was taken before, or after, the incident in the Virgin Islands.

If you can give me a date of the incident in the Virgin Islands I will be able to work that out.

Q. The government has those dates, I don't.

Did Ms. Goodwin supply you with information that you forwarded to the prosecutors in the Brenna case when you took her statement?

A. This statement?

Q. Yes.

A. It is available to the prosecutors in Southern Florida.

Q. When she said in that statement that Brenna had wired the money forward wasn't that information that you wanted to give to the prosecutors

[97] * * * * *

Q. As far as you could tell he had nothing to do with any boat business?

A. Legal business, no, sir.

Q. Did he have any business with boats?

A. Yes, sir.

Q. When you say illegal business with boats, did he repair boats illegally?

A. No.

Q. Did he buy and or sell boats illegally?

A. In the furtherance of a narcotic organization, yes, sir.

Q. So you did have evidence that he bought and sold boats?

A. Yes, sir.

Q. How many?

A. I don't recall, sir.

Q. Calliope being one of those?

A. Where did that come from?

Q. Transcript of your interview of Ms. Goodwin, questions that you and the other agents asked.

MR. MERIN: Would you direct the witness to the page and line?

Q. Do you recall that name?

[98] A. Yes.

Q. What is it?

A. A sail vessel.

Q. Did Brenna have an interest in it?
A. Yes.
Q. Did he buy it?
A. He was part of the purchase of it.
Q. Did he own a boat in New Jersey?
A. I believe he owned several, sir.
Q. Did he sell some of them?
A. When, can you be specific with years?
Q. I don't know facts, I am asking you based on your interview with Goodwin.
MR. MERIN: Based on the transcript?
MR. PLAISTED: Yes.
A. Before the interview of Ms. Goodwin I don't believe he sold them.
Whether he has now sold boats I don't know.
Q. How many did he own at the time of the interview with Ms. Goodwin?
A. I believe he owned a few of them, sir.
Q. When you say a few, approximately how many?
MR. MERIN: If you know.
[99] A. Approximately 3.
Q. What were the names of those boats?
A. The Saharra, the sail vessel Caliby, the sail vessel Capricorn, and the motor vessel Apache Chief, and other vessels he has used in the importation of marijuana.
Q. You aren't saying those other boats you named were all used in the importation of marijuana, or are you?
A. I am saying that the majority of them are.
Q. What is your factual basis for that statement?
MR. MERIN: I am instructing the witness not to answer, investigatory privilege.
Q. Who told you that the Caliby was used for importing drugs?
A. Informants, sir.

Q. Who told you that the the Saharra was used for drugs?
A. Informants, sir.
Q. Who told you that the other 2 vessels that you named were used for drugs?
MR. MERIN: The Apache Chief?
A. Informant's.
Q. Who told you whatever the name of the

* * * * *

[108] A. Let me talk to Mr. Gallagher for a second.
(Short recess.)
(Record read.)
A. Nobody directly told me out of their mouths saying that Beth Ann Shurack was a nominee; witnesses that are in the interrogatories there have given information pertaining to the purchase of the house, the pick up of the money of the house and who was present during negotations.
Q. None of the attorneys told you that she was a nominee, correct?
A. The word nominee, no.
Q. And Lois Geiling didn't tell you that she was a nominee or nominal party?
A. Again, sir, no one directly said that Beth Ann Shurack was a nominee.
What they did say was Beth Ann Shurack was the person who did the negotiating, went looking for the house, who picked up the money.
Q. Who moved in?
A. No one said they had seen her move into the house.
Q. You doubt that she moved in?
A. She had to move in.
Q. I take it Mr. Mazacco did not say she was [109] a nominee for Mr. Brenna, either?
A. Nobody has told me, nobody.

* * * * *

[113] * * * * *

[Q.] Do you know whether there is any reference to Murphy knowing anything about drugs that Brenna was allegedly selling in that trial transcript?

[114] A. I don't believe Mr. Murphy had any personal knowledge of what Mr. Brenna did for a living.

Q. In fact he said that in the trial transcript, didn't he?

A. If that's what you are saying.

Q. I am asking you, did he say, "I don't have any personal knowledge of what Brenna did for a living"; did he ever say that to you?

A. To me, yes.

Q. So Murphy is not the basis for paragraph 12, is he?

MR. MERIN: You have gotten an answer.

MR. PLAISTED: No, I didn't. He said one time Murphy was. We have now explored it and I am assuming Murphy is not the basis for paragraph 12.

MR. MERIN: That's an assumption you are making.

MR. PLAISTED: I agree, and that's why I ask asking him.

MR. MERIN: If the witness wants to review the—

Q. Is Murphy the factual basis for paragraph 12?

MR. GALLAGHER: I would object. Essentially the question becomes a compound question [115] because there are 2 facts in issue in paragraph 12.

I think the witness is having a little difficulty understanding it because you are basically asking compound questions by asking about number 12.

Q. Did Murphy ever say anything about the 2 hundred 16 thousand coming from drugs?

A. No.

Q. In fact he said he didn't know, correct?

A. Did not know what Mr. Brenna did for a living.

Q. Correct. And he said he didn't know whether or not the money came from drugs?

A. Correct, sir.

Q. And the only one who has provided a factual basis to you for paragraph 12 is Mazacco, correct?

MR. GALLAGHER: I am going to direct the witness not to answer.

He has answered that question.

MR. MERIN: Let him.

MR. GALLAGHER: Okay, you may answer that question.

A. Yes, sir.

MR. MERIN: Faster this way.

Q. In paragraph 13, could you set forth the full factual basis for your statement that Beth Ann [116] Goodwin as a nominee or nominal party for Brenna kept up the property at 92 Buena Vista Avenue?

A. Beth Ann Shurack's transcript.

Q. Right.

A. Her transcript.

Q. Okay.

Can you set forth the full factual basis for your statement in paragraph 14 that Brenna obtained the 2 hundred 25 thousand dollars used to maintain the property from drug transactions?

A. Mazacco.

Q. Can you set forth the full factual basis for your statement in paragraph 17 that Brenna accumulated huge profits by multiple criminal acts involving drugs and drug transactions before, during and after the acquisition of the defendant's property by Beth Ann Goodwin?

A. Beth Ann Shurack's deposition and informants and our criminal investigation.

Q. When you say your criminal investigation what do you mean?

I would like the facts.

MR. GALLAGHER: I will direct the witness not to answer as to what his criminal investigation is.

* * * * *

[134] Q. When you were assigned to this project in December 1986 Mr. Murphy had already turned over all of the records of his wire transfers, correct?

A. Mr. Murphy's records were all in the possession of the Drug Enforcement Administration.

Q. That was when you began this project, in December 1986?

A. They were already in their possession.

Q. Let me show you, for example, page 24, where questions are asked directly about Buena Vista Avenue.

You and Agent Lohr knew before May 5, 1988, when you went to interview Ms. Goodwin that money had come from Brenna via wire transfer that was ultimately used to purchase 92 Buena Vista, correct?

A. Yes.

Q. Has Mr. Mazacco ever been tape recorded? And if I asked that I apologize.

A. No, sir.

Q. Has Mr. Mazacco been investigated in connection with drug transactions that you do not allege Brenna controlled?

MR. GALLAGHER: Objection.

Can you give me a little hint as to how [135] that is going to lead to relevant evidence?

MR. PLAISTED: Mazacco is the only witness in this case who has any evidence that supports your complaint.

I want to know everything I can about that witness upon whom you are banking to go and seize Ms. Goodwin's house and so I intend to ask as much as I can about him, find out as much information, and of course substitute him for Mr. Murphy, I guess, since Mr. Murphy apparently doesn't have any information that is helpful in terms of showing this is drug money.

So I want to know as much as I can about Mazacco and that's why I am asking it.

A. Repeat that question.

Q. Does Mr. Mazacco have any drug involvement known to you that are related to transactions that are not controlled by Mr. Brenna?

A. The answer to that is, yes, I believe he does.

Q. Has the Government foregone prosecution against him for those other transactions to gain his cooperation?

A. My answer to that is it is the same organization.

Q. Is one of the cases Mr. Mazacco is cooperating in this seizure action?

[136] A. Yes.

Q. Has Mr. Mazacco received remuneration from the government in the form of money?

A. No.

Q. Has Mr. Mazacco received any benefits from the government of a monetary nature?

A. No.

Q. How many times has Mr. Mazacco violated the drug laws in so far as you know?

A. Less than 10 times.

Q. How many years has he been involved in drug transactions, as far as you know?

A. Approximately the past –

MR. GALLAGHER: Pardon me.

(Discussion off the record between the witness and government counsel.)

(Record read.)

A. A few years total.

Q. When you say a few years, he started at least as early as 1982, correct?

A. Yes.

Q. Was he involved before 1982?

A. Approximately 1981.

Q. Was he involved before 1981?

A. Not that I know of.

[137] Q. From 1981 until what point did he continue to be involved in drug transactions?

A. Drug transactions, I believe sometime in the beginning of 1987.

Q. And have you seized any of Mr. Mazacco's assets?

(Discussion off the record between government counsel and the witness.)

A. No.

Q. Between the years 1982 and 1987 did Mr. Mazacco have any employment on a regular basis that was legal?

A. I think he did, sir.

Q. What was it?

A. To the best of my recollection, I believe it was something to do with chartering in Southern Florida, boats.

Q. Was he in the boat business?

A. What is your definition of "boat business"?

Q. Was he chartering in the boat business?

A. Yes.

Q. Did you have any information which indicated that Mr. Brenna may have chartered boats from time to time, chartered out boats that he owned?

A. No.

[136] Q. Did you have any information indicating that he did not charter out boats that he owned?

A. No.

Q. Wouldn't you agree that it is a fair assumption that if you own a number of boats as you have identified Mr. Brenna as owning that you may well charter them out from time to time if you can't use them all at once?

MR. MERIN: Objection, argumentative. I instruct the witness not to answer.

Q. Did you ever make inquiry to determine whether Mr. Brenna chartered out boats?

A. Inquiries must have been made, sir.

Q. But you did not?

A. I believe I did.

Q. Whom did you inquire of?

A. Probably there was no one to inquire to.

Q. So then I take it you didn't, you were not actually able to make any such inquiries as to whether he chartered out boats because you couldn't find anybody to ask?

A. Correct.

Can we, can you go back a couple of questions? I want to make sure I answered them correctly.

(Record read.)

[139] A. Pertaining to chartering boats, that Mr. Brenna may have chartered out boats—

Q. May have chartered out his boats?

A. Chartered out his boats?

Q. Yes.

A. There is information that Mr. Brenna had chartered out a vessel; whether he owned it, his organization owned it, a corporation owned it, is not determined at this time.

(Exhibit CG 19 marked for identification.)

Q. Is it fair to say that other than the facts supplied by Mazacco as to the source of the money used, transferred from Brenna to Murphy to Davis for the purchase of the house, there is no other witness who identifies those funds as drug money?

MR. MERIN: At this point in time?

I object, for the record.

A. We are talking about the funds for the 2 hundred 16 purchase of the house?

Q. Yes.

A. At this time, correct.

Q. When you say "at this time"–

A. Pertaining to that 216 for that house as we sit here, yes.

Q. Did Mazacco provide you any documents that [140] showed that that money given by Brenna to Murphy was drug money?

A. Mazacco was not present when the money was given to Shaun Murphy; ask Shaun Murphy.

Q. My question to you is, did Mazacco give you any documents that showed that the source of the money that Brenna gave Murphy that was transferred to Davis was drug money?

A. No.

Q. Did Mazacco give you any other physical evidence that shows that the money that Brenna later gave to Murphy out of Mazacco's presence was drug money?

A. No.

Q. Did you ever ask Mazacco if he knew where the money Brenna gave Murphy in October of 1982 came from?

MR. GALLAGHER: Objection.

MR. PLAISTED: Goes to this witness' affidavit.

MR. GALLAGHER: You are asking him what he asked Mr. Mazacco?

MR. PLAISTED: Right.

MR. GALLAGHER: I am going to direct him not to answer; that's work product.

[141] Q. Does Mazacco know the source of all money Brenna had in 1982?

A. No.

Q. Did Mazacco and Brenna live together in 1982?

A. Not that I know of.

Q. Did they have daily contact in 1982?

A. I don't no [*sic*], sir.

Q. Did Mazacco live in the same town Brenna did in 1982?

MR. MERIN: All year?

A. I don't recall if Mazacco lived in Rumson, New Jersey, or the lower portion of New Jersey.

Q. Does Mazacco claim to know the details of all of Brenna's finances?

A. No.

Q. Was Mazacco's only contact with Brenna the single alleged drug transaction that you have previously identified in 1981 and 1982?

MR. GALLAGHER: Objection.

MR. PLAISTED: We may be able to get our motion done without other depositions if we get through this.

MR. GALLAGHER: I don't think I am going to allow him to answer as to the scope of what Mazacco [142] told him.

Mazacco is available; you can take his deposition.

MR. PLAISTED: Don't you think it would be easier to have full discovery now and make our record, rather than fudging around?

MR. MERIN: We are not fudging around. What you are proposing puts us in the position of where someone on the basis of information gathered in preparation for litigation, using that information in essence–

MR. PLAISTED: This man filed the affidavit.

MR. MERIN: That would be speculating as to what Mazacco may have said.

Q. Can you set forth in full for me the facts that show that the 2 hundred 25 thousand given by Brenna to Murphy was proceeds of a drug transaction?

A. Mazacco.

Q. What are the facts that show that?

A. Importation.

Q. I understand you got the information from Mazacco but what are the facts?

MR. MERIN: I think he has already answered.

[143] MR. PLAISTED: In little bits and pieces.

Q. If you would, would you give me in full the facts that support your statement that the 2 hundred 25 thousand dollars given by Brenna to Murphy were the proceeds of a drug transaction?

A. You will have to see Mazacco and also you will have to go to the IRS and see what Mr. Brenna has claimed he has done for a living.

Q. He hasn't filed anything, right – that doesn't do me any good – correct, he has not filed anything, according to what you produced here today?

A. There is a certification of lack of records and that is Beth Ann's testimony.

Q. What I am asking you is, in the complaint that you swore to you allege that the 2 hundred 25 thousand was traceable to a drug transaction.

Can you tell me in full the facts that support that?

MR. GALLAGHER: He just did, asked and answered.

A. You have been told to see Mazacco.

Q. You are giving me the source, I want the facts.

MR. MERIN: I think he has identified –

Q. Are there any facts that you know of?

[144] MR. MERIN: The answer to that is in terms of the contents of what is in the investigatory report. We are going to instruct him not to answer that.

A number of the detailed facts which might have formed part of interviews with Mr. Mazacco – you would be asking this man to produce work product.

MR. PLAISTED: He already described a drug transaction in the Northeast or Southern Florida and I was trying to make sure I hadn't missed anything and give him the

chance to set forth in full the facts to support his contention that he made in his affidavit that the 2 hundred 25 thousand came from a drug transaction.

Q. Can you identify those facts?

A. My answer again to you is going to be, Mr. Mazacco's statement.

Q. What are the facts as you understand it from his statement?

A. As I laid out before to you there was an importation either in Southern Florida, I believe in the Northeast, and there was an importation of multi-tons of marijuana, and what else Mr. Mazacco has to say.

Q. What else does he have to say that supports your contention?

[145] MR. GALLAGHER: We are not going to allow him to answer.

Q. Do you have any facts to show that you can trace that 2 hundred 25 thousand to this drug transaction?

MR. MERIN: Directly?

Q. Yes?

A. Mr. Mazacco's statement and Mr. Murphy's –

Q. You talked to Mazacco at length. Does he specifically trace this money and can he say that the 2 hundred 25 thousand given to Murphy was from a drug transaction; can he say that?

MR. GALLAGHER: I am going to direct him not to answer because it is work product.

MR. PLAISTED: Will you pay for all of the costs it will take to find out if Mazacco can't say it?

He knows; why can't he say it and we can move along?

MR. GALLAGHER: I directed him not to answer.

Q. Do you agree Mazaceo wasn't present in the Virgin Islands, correct, when Brenna gave money to Murphy, correct?

A. You are going to have to go through that again.

Q. Was Mazacco present in the Virgin Islands [146] when Brenna gave Murphy money?

A. When?

Q. 1982.

A. Not that I know of.

Q. Did Mazacco accompany Brenna to the Virgin Islands in or around 1982?

A. For what reason?

Q. For any reason.

A. Not that I know of.

Q. Does Mazacco have any way of knowing that Brenna didn't get the 2 hundred 25 thousand that he gave Murphy from a drug transaction?

MR. GALLAGHER: Objection. Calls for speculation of what Mazacco knows.

MR. PLAISTED: He has talked to him.

MR. MERIN: Still asking him—

MR. PLAISTED: It will save us a lot of time.

(Record read.)

MR. MERIN: The question is difficult for me to follow. There is a double negative there.

Q. Does Mazacco have any way of knowing the actual source of the precise 2 hundred 25 thousand dollars that Brenna allegedly gave Murphy in 1982?

[147] A. Sir, I have no idea of what Mazacco has knowledge of pertaining to that.

Q. Didn't you interview him about that precise fact before you signed your affidavit?

A. Pertaining to the 2 hundred 14?

Q. Did you ever interview him at all as to whether or not the money given Murphy by Brenna was known to Mazacco to be drug money?

A. Mazacco didn't have have knowledge of the money being transferred offshore to Mr. Murphy, that I know.

Q. Thank you.

MR. PLAISTED: Why don't we just stop. I will make my motion.

* * * * *

CERTIFICATE

I hereby certify that the witness herein was duly sworn by me and that the foregoing is a true and accurate transcript of the proceedings as taken by me on the date and at the time and place hereinbefore set forth.

/s/ William Sokol

WILLIAM SOKOL, Notary Public and Certified Shorthand Reporter of the State of New Jersey.

Supreme Court of the United States

No. 91-781

UNITED STATES, PETITIONER

v.

A PARCEL OF LAND, BUILDINGS, APPURTENANCES AND IMPROVEMENTS, KNOWN AS 92 BUENA VISTA AVENUE, RUMSON, NEW JERSEY, ET AL.

ORDER ALLOWING CERTIORARI.
Filed March 2, 1992.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted.

March 2, 1992

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(9)

No. 91-781

In The

Supreme Court of the United States

October Term, 1992

UNITED STATES OF AMERICA,

Petitioner,

v.

A PARCEL OF LAND, BUILDING, APPURTENANCES AND IMPROVEMENTS KNOWN AS 92 BUENA VISTA AVENUE, RUMSON, NEW JERSEY, AND BETH ANN GOODWIN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether a person who receives proceeds allegedly derived from drug trafficking and uses those proceeds to purchase a home is entitled to assert an "innocent owner" defense in an action seeking civil forfeiture of the home.

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To The United States Court Of Appeals
For The Third Circuit

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 937 F.2d 98. The opinions of the district court denying respondent Goodwin's motion for dismissal and for summary judgment (Pet. App. 17a-35a) and certifying certain questions for interlocutory appeal (Pet. App. 38a-45a) are reported, respectively at 738 F. Supp. 854 and 742 F. Supp. 189.

JURISDICTION AND STATUTORY PROVISIONS INVOLVED

The Respondent accepts the statement of jurisdiction and recitation of the statutory provisions involved as set forth in the Brief of the United States. In addition, the Fourth Amendment and the Fifth Amendment to the Constitution, which prohibit unreasonable seizures and the deprivation of property without due process, are involved.

STATEMENT

Respondent Beth Ann Goodwin lived with Joseph Brenna in a relationship akin to marriage from early 1981 to late 1987. Brenna supported Ms. Goodwin and her children from the beginning of that relationship. JA 31-33. In late 1982, Brenna instructed Shaun Murphy, an accountant who managed investments for Brenna and other clients, to liquidate a certificate of deposit and transfer approximately $216,000 to Goodwin's attorney in New Jersey. JA 14; 44-46. Ms. Goodwin used that money to pay the balance of the $240,000 purchase price for a home at 92 Buena Vista Avenue, Rumson, New Jersey in November 1982. Ms. Goodwin severed her relationship with Brenna in late 1982 and barred him from the property. JA 32. Ms. Goodwin held title to the house; she resided there and treated it as her own, paying for all taxes, maintenance and improvements. She has willed the property to her children. JA 32. She provided a sworn assertion that she had no knowledge that the money used to purchase the house was drug-related and that she gave no consent to any drug transactions on or involving the property. JA 32.

In April of 1989, the United States seized Ms. Goodwin's home where she was residing with her infant and two adolescent children. Mr. Brenna never had any legal, equitable, or ownership interest in the property and had none at the time of the seizure. JA 32.

No pre- or post-seizure evidentiary hearing was ever held. Ms. Goodwin filed a motion to dismiss the seizure action and for summary judgment in September 1989. The district court held that there was probable cause to believe the property was purchased with the proceeds of a drug transaction and, therefore, that Ms. Goodwin could not, as a matter of law, maintain an innocent owner claim to the property.[1] After concurring in the finding of

[1] No cognizable evidence that controverted Ms. Goodwin's innocence was ever submitted. In May 1988, in connection with the criminal investigation of Mr. Brenna, the government compelled Ms. Goodwin to provide testimony while promising that her testimony would not be used against her. Ms. Goodwin's immunized testimony was nonetheless used to prepare the forfeiture complaint. Pet. App. 10-11, 29-30. Her testimony revealed that she believed Brenna owned a boat business which supplied the income that he used to support her. She admitted that the funds for her support, the down payment for the home, and the used car purchased for her were provided by Brenna. She acknowledged that she did not have independent income and did not file tax returns for that time period. Such testimony cannot be used against her. *Braswell v. United States*, 487 U.S. 99, 119 (1988). Goodwin's immunized testimony verifies her innocence and lack of knowledge concerning the $216,000, both at the time of the alleged criminal transaction and on the date the house was purchased. The United States did not plead in the complaint, concededly drafted by use of her immunized testimony, that the claimant was *not* innocent and submitted no cognizable

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probable cause,[2] the Third Circuit reversed the district court, holding that an owner of a home, who was innocent of involvement in the drug trade and did not know that funds used to purchase or maintain a property may have come from drug proceeds, had a defense to that forfeiture action. (Pet. App. 6a-9a.)

SUMMARY OF ARGUMENT

The government asks that the Court apply the relation back doctrine to extinguish the ownership rights of an innocent homeowner even though neither the homeowner nor the property participated in the offense warranting forfeiture. This Court has never sanctioned an *in rem* forfeiture on the theory that "proceeds" traceable to

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evidence of her knowledge that the funds were traceable to drug proceeds. The Drug Enforcement Agency ("DEA") representative who attested to and drafted the Complaint, Agent Giacobbe, simply asserted at his deposition that she must have known, since she lived with Brenna. *See infra* at pp. 24-26.

[2] Both the district court and the Third Circuit relied on the filing of the Brenna indictment in April 1990, a full year after Ms. Goodwin's home was seized, to find probable cause. Review of that indictment reveals no allegations of any specific drug transaction prior to 1985. JA 34-40. No consideration was apparently given by the Court below to the fact that Goodwin's immunized testimony had been gathered in part to underpin the indictment against Brenna. To the extent the indictment provided the probable cause to seize her home, her immunized testimony was improperly used to deprive her of her home.

an offense came into the hands of an innocent third party long after any alleged offense and were used by that third party to purchase property which property thereby becomes forfeit.

Due process and the prohibition against unreasonable seizures should prohibit the forfeiture when both the homeowner and the property are not substantially connected to the offense. The remission and mitigation provisions of the Code of Federal Regulations provide no remedy of constitutional significance since they invest the claimant with no enforceable rights.

The innocent owner provision of Section 881, if construed broadly to protect all innocent owners, would make this statutory scheme constitutional. Anything less will not. The legislative history and the plain meaning of the statutory language both strongly suggest that a broad construction of Section 881 is appropriate.

ARGUMENT

AS LONG AS DRUG FORFEITURE LAWS ARE USED TO FORFEIT DRUG "PROCEEDS" IN THE HANDS OF THIRD PARTIES, THE "INNOCENT OWNER" DEFENSE MUST BE GIVEN A BROAD CONSTRUCTION.

Forfeiture by the sovereign is a concept that has its roots in English common law and it continued in our federal case law immediately after the adoption of the Constitution. Forfeiture actions fall into two distinct categories: *In rem* forfeiture of an inanimate object where the object is seized and is treated as the defendant on the

theory that the object itself is the wrongdoer. Contraband and objects used in the commission of an offense are forfeit as a result of the property's participation in the crime. Forfeiture based on *in personam* jurisdiction over a felon is intended to deprive the criminal of all of the proceeds of his criminal actions. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680-83 (1974); *see generally, Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 628 n.5 (1989) (Blackmun, J., dissenting); *Waterloo Distilling Corp. v. United States*, 282 U.S. 577, 581 (1931).

This is an *in rem* action. The government therefore contends that the owner's innocence (and indeed, the owner's identity) is irrelevant. (Br. at 14) Rather, the property is forfeit since the money that funded its purchase was allegedly traceable to a drug transaction. Unlike most *in rem* actions, this case is not based on the theory that the home was involved in the drug trade but rather, on the theory that it was purchased with proceeds for which there was probable cause to believe were traceable to a drug transaction.

During the last few years, as an aid to federal law enforcement efforts, certain statutes have been enacted permitting the forfeiture of "proceeds" of illegal activity. The forfeiture statutes in existence prior to the enactment of the Racketeering Statute, 18 U.S.C. 1963 *et seq.* ("RICO"), in 1970 did not provide for the seizure of "proceeds". Recently, many federal criminal statutes have been enacted for the forfeiture of proceeds. *See, e.g.*, 18 U.S.C. 981; 18 U.S.C. 2253 and 2254; 18 U.S.C. 1467; 21 U.S.C. 853 and 881. The jurisdiction for such actions should be *in personam* jurisdiction over the individual

defendant where all proceeds of an offense in whatever form could be forfeit.

In this case and in certain other recent cases, the government has purported to exercise *in rem* jurisdiction pursuant to Section 881 to attach downstream "proceeds" of illegal activity. No Supreme Court case has approved such efforts. Earlier Supreme Court cases wrestled with the concept that a piece of property involved in a crime was tainted and irrevocably forfeit as of the date of that crime. A subsequent transfer to a bona fide purchaser of that guilty property was irrelevant. The guilty property was forfeit. The proceeds were not. As Justice Marshall stated in *United States v. Grundy and Thornburgh*, 7 U.S. (3 Cranch) 337 (1806):

> To decide finally on the propriety of supporting the claim of the United States, as made in this action, under that branch of the statute which forfeits the vessel, another question still remains to be investigated. Has the doctrine of relation such an influence upon this case that an election subsequent to the sale shall carry back the title of the United States to the commission of the act of forfeiture, so as by this fiction of law to make them the real owners of the vessel at the time of sale, and consequently of the money for which she was sold?
>
> Without a critical examination of the doctrine of relation, it would seem to be a necessary part of that doctrine, that the title to a thing which is to relate back to some former time, must exist against the thing itself, not against some other thing which the claimant may wish to consider as its substitute. To carry back the title to the Anthony Mangin to the act of forfeiture, the title

> to the Anthony Mangin must have an actual existence. If no such title exists, then the right to elect the vessel is lost, and the statute has not forfeited the money for which she was sold in lieu of her. Suppose, instead of being sold by the defendants, she had been exchanged by Aquila Brown himself for another ship, would that other ship have been forfeitable, by the doctrine of relation, in lieu of the Anthony Mangin? Clearly not; for the statute gives no such forfeiture. The forfeiture attaches to the thing itself, not to any article for which the thing may be exchanged.

7 U.S. at 354.

But this is not such a case. Rather, the government claims, this real property became tainted by virtue of its purchase with funds traced to a certificate of deposit, which certificate of deposit was allegedly traceable to funds allegedly involved in a drug transaction. The government's use of forfeiture statutes to seize proceeds of drug transactions in the hands of innocent third parties is thus a recent development and is based upon statutes not previously construed by this Court. In *United States v. Grundy and Thornburgh, supra,* Justice Marshall made clear that "the forfeiture attaches to the thing itself, not to any article for which the thing may be exchanged." 7 U.S. at 354. An action for the proceeds could only be maintained against the person. 7 U.S. at 355.

In *United States v. Farrell,* 606 F.2d 1341 (D.C. Cir. 1979), the Court was asked to forfeit the funds paid for heroin. The drugs forfeiture statute in effect at the time did not specify that "proceeds" could be forfeited. The Court held that while the drugs were forfeit, the money

used to pay for drugs, *i.e.*, "derivative contraband," was not forfeit. 606 F.2d at 1344-46.

As the government perceives it, contraband flowing through the stream of commerce taints all funds or things of value for which it is exchanged, and those proceeds in turn taint and forfeit every subsequent article to which they are traceable. Consider the following theoretical scenario: In 1987, Goodwin mortgages the home in order to borrow $5,000. She uses the funds to purchase a used car. In 1990, she sells the car to the U.S. Attorney for the District of New Jersey for $2,500, and she uses the $2,500 to purchase a new computer from a local retailer. The government's construction of Section 881 would allow it to forfeit: (1) the house, currently mortgaged to a bank; (2) the car, currently owned by the U.S. Attorney; (3) the computer, currently owned by Ms. Goodwin; and (4) the $2,500 in the possession of the computer retailer.

This problem of following proceeds through the chain of title is not so implausible. Could the United States forfeit the $216,000 from the person who sold the house to Ms. Goodwin? The government recognizes the weakness of its construction when it states "this case concerns only the recipient of a gift of drug proceeds although normally a transaction will generate derivative proceeds that is property back to the drug dealer". Br. at 36, n. 13. The true meaning of the term "proceeds" in Section 881(a)(6) is property in the hands of the drug dealer. "Proceeds" thereby has a meaning in furtherance of Congress' effort to deprive a drug dealer of his profits. An *in personam* action would seem to be the appropriate means to strip a defendant of any further "proceeds" of his offense. The theory that property later transferred to

an innocent person by a drug dealer is tainted because it was once possessed by a drug dealer, and that it will proceed to infect other property, is foreign to this Court's construction of the forfeiture law over the last 200 years.

None of the historical precedents cited in the government's brief stands for such a proposition. Each of the Supreme Court cases construing the relation back doctrine in *in rem* cases concerns property over which the Court had jurisdiction because that property had been directly involved in the violation of federal criminal laws and was forfeitable as a result of its participation in the crime. None of those *in rem* cases involves property that became tainted after the illegal acts by virtue of being purchased by an innocent third party with proceeds traceable to an earlier illegal transaction.

The application of the relation-back doctrine makes little sense when applied to "proceeds" such as the property herein. The property was in the hands of strangers to the events at the time of the alleged illegal acts by Brenna in 1981 or 1982. Applied literally, Section 881(h) would divest the title from the people who sold 92 Buena Vista Avenue to Ms. Goodwin long before she ever met them. Yet even under the government's theory, the property did not become tainted until it was purchased with alleged proceeds, which was long after the illegal event giving rise to the forfeiture.

The concept of applying the relation back doctrine to "proceeds" traceable to a drug transaction is novel. Proceeds should mean only the funds used to purchase the drugs in the hands of the criminal defendant. *See United States v. Farrell, supra*. Congress was concerned with

defendants who turned drug money into jewelry, real estate or other valuables in order to further facilitate the drug trade. When a drug dealer sells a piece of real estate that he had purchased with drug money, he will receive proceeds in return. Those proceeds will then be forfeitable in an action against him personally (either criminal or civil). Is the money he expends as it flows downstream into the hands of innocents also forfeit? Does the government contend that it can forfeit both the property as it flows downstream and the derivative proceeds to the drug dealer as well? Does due process permit such double or triple forfeitures of the property of innocent owners? If the government's expansive theory is adopted, there will eventually come a time when virtually all assets will be tainted in whole or in part. Congress intended to punish the drug dealer, and protect the general public. Permitting the forfeiture of all downstream proceeds will serve to punish not the drug dealer, but the public that Congress intended to protect.

The phraseology in 21 U.S.C. 881(a)(6) of "all proceeds traceable to such an exchange" should mean the proceeds in the hands of the criminal defendant or in the hands of individuals with knowledge of the proceeds' tainted origin. To construe that phraseology to mean the items that are transferred from such a drug dealer to others and to then follow those transfers downstream creates *in rem* jurisdiction over property that is not guilty of participating in the offense.

The government's "taint" will apply to a host of other assets as they flow in the stream of commerce. After Goodwin and Brenna separated in late 1987, she did

indeed take a mortgage on her house, utilizing that mortgage for, among other things, living expenses, food, etc. Assume she had also used a portion of that mortgage to set her oldest child up in business. According to the government's present theories, they would have every right to seize the house, the oldest child's business and the food and necessaries purchased with the mortgage proceeds. If the oldest child's business had been successful, would the government have a right to seize the entire business that had prospered due to the child's efforts and would its claim be superior to creditors who were secured by financing agreements, revolving credit agreements and UCC filings?

Are all such items and security interests equally voidable? The construction sought by the government goes far beyond anything Congress contemplated and far beyond anything this Court has indicated is constitutionally permissible.

THE DUE PROCESS CLAUSE PROHIBITS THE CONSTRUCTION OF 21 U.S.C. 881(a)(6) URGED BY THE GOVERNMENT.

In this case, there has been no evidence and no finding that the property had any substantial connection to the drug trade, apart from its purchase with alleged proceeds.[3] The government argues that the Third

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[3] There is an allegation in the complaint that in December 1986 Brenna transferred money to a person as a reward for

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Circuit's decision to protect an innocent owner from the forfeiture of her home undercuts its efforts to eradicate illegal drug trafficking. .Br. at 42-43. The legislative history to other portions of these same drug forfeiture statutes reveals that Congress intended to impose punishments even more severe than traditional criminal punishment on drug violators by virtue of these forfeiture statutes:

> Today, few in Congress or the law enforcement community fail to recognize that the traditional criminal sanctions of fine and imprisonment are inadequate to deter or punish the enormously profitable trade in dangerous drugs which, with its inevitable attendant violence, is plaguing the country. Clearly, if law enforcement efforts to combat . . . drug trafficking are to be successful, they must include an attack on the economic aspects of these crimes. Forfeiture is the mechanism through which such an attack may be made.

S. Rep. No. 98-225, 98th Cong., 2d Sess. 1991, reprinted in 1984 U.S. Code Cong. & Admin. News 3374.

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participating in a marijuana importation and that that transfer of money took place on the premises. JA 15. The basis of that allegation was an unsworn hearsay statement made by an unreliable informant to a government agent. No evidence, hearsay or otherwise, was ever provided that suggested that Ms. Goodwin participated in, consented to or even knew of such a transaction. There is no claim or evidence that any drugs were ever on the premises nor was any finding made by either court below that there was probable cause to find that the property was used to facilitate the drug trade.

The forfeiture of a citizen's home is essentially criminal in nature. Innocent persons defending against such actions are entitled to the same protections to which criminal defendants are entitled. They should not be deprived of their homes on the basis of a showing of probable cause alone.

This court has held that the Fifth Amendment privilege against self-incrimination is applicable to all forfeiture proceedings whether in the context of a criminal prosecution or in an action denominated civil but which imposes penalties such as forfeiture, which are of criminal proportions. In *Boyd v. United States*, 116 U.S. 616, 633-34 (1886), this Court held:

> We are also clearly of opinion that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal. . . . The information, though technically a civil proceeding, is in substance and effect a criminal one . . . As, therefore, suits for penalties and forfeitures, incurred by the commission of offenses against the law, are of this quasi criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the Fourth Amendment of the Constitution, and of that portion of the Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself.

This Court has followed an "abstract approach" to determine which constitutional protections offered by the Bill of Rights apply to such quasi-criminal proceedings. Each penalty statute is individually analyzed for this

determination. *See United States v. Halper*, 490 U.S. 435 (1989); *United States v. Ward*, 448 U.S. 242, 248-52 (1980).

While this Court has not specifically been called upon to apply the constitutional protections of the Fourth and Fifth Amendments to forfeitures pursuant to 21 U.S.C. 881, it has recognized their applicability to other forfeiture statutes. *United States v. U.S. Coin and Currency*, 401 U.S. 715, 719 (1971); *United States v. $8,850 in U.S. Currency*, 461 U.S. 555 (1983); *One 1958 Plymouth Sedan v. Commonwealth of Pennsylvania*, 380 U.S. 693, 700 (1965) ("a forfeiture proceeding is quasi-criminal in character. Its object, like a criminal proceeding, is to penalize for the commission of an offense against law"). *See also United States v. Riverbend Farms Inc.*, 847 F.2d 553, 558 (9th Cir. 1988), where the Ninth Circuit concluded that the constitutional protections under the Fourth and Fifth Amendments were applicable to forfeitures under the Lemon-Marketing Act.

In *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974), this Court upheld a statute modeled upon 21 U.S.C. 881 (but apparently without an innocent owner exception) in the face of a due process challenge. This case materially differs, however, in that the government seeks to apply the forfeiture statute to downstream proceeds which were not involved in the illegal activity and where the owner was not privy to the illegal activity. In words pertinent here, the Court stated:

> It would be difficult to reject the constitutional claim of an owner . . . who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the

> proscribed use of his property; for in that circumstance, it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive.

Id. at 689-690 (citations and footnotes omitted).

In *Calero-Toledo*, this Court did not address the impact of the Fourth Amendment on the drug forfeiture proceeding. 416 U.S. at 679 n. 14. We ask this Court to address that question now. A forfeiture proceeding is an elongated but permanent seizure and should be subject to the Fourth Amendment. We submit it is constitutionally unreasonable to seize and forfeit the home of an innocent owner who is not alleged to be involved in the illegal activity when the property was not itself involved in the illegal activity.

In *United States v. 1960 Bags of Coffee*, 12 U.S. (8 Cranch) 398, 404-405 (1814), this Court construed a forfeiture statute that "expressly declared that the forfeiture shall take place upon the commission of the offense" and therefore determined that the forfeiture related back to the date of the crime and all bona fide purchase rights were abrogated. Although that forfeiture statute clearly did not provide any exception for subsequent innocent owners, Mr. Justice Story dissented and would have refused to apply the relation back doctrine:

> If the principle contended for by the government be admitted in its full extent, it will be found very difficult to bound it. A bale of goods which is once contaminated with a forfeiture will retain its noxious quality through every successive transfer, even until it has assumed under the hands of the artisan its ultimate

> application to domestic use. Yet such a position would strike us all as monstrous.

Id. at 416.

While *Calero-Toledo, supra*, upheld such seizures under the due process clause, the early members of this Court had difficulty with the harshness of the doctrine even when cases were limited to property which was itself guilty.

The government seeks to forfeit the house and home of Beth Ann Goodwin which she has now owned and maintained for almost a decade. There is no claim that the government or the public has been harmed or damaged by Ms. Goodwin's conduct, nor is there any claim that the forfeiture of Ms. Goodwin's home will remedy a specific harm that has been inflicted upon the federal government or the public by her or her children. This penalty has no identifiable remedial aspect; it is a drastic type of quasi-criminal forfeiture. Forfeiture of the homes of innocent partners in a spousal type relationship operates to penalize wives and children for the alleged but unproven crimes of their husbands and fathers. Consistent with this Court's recognition of the sanctity of the home, *e.g.*, *United States v. Karo*, 468 U.S. 705, 714 (1984), and *Payton v. New York*, 445 U.S. 573, 590 (1980), the full protections afforded by the Fourth and Fifth Amendment should apply to all such forfeiture actions.

A. Due Process And The Prohibition Against Unreasonable Seizures Require That The Government Prove That The Property Or The Homeowner Be Significantly Involved In Drug Activity Before A Forfeiture May Proceed.

The deposition of the affiant to the complaint made plain that the government's informant upon whom he

relied had no personal knowledge that the money, transferred to Goodwin in 1982 and later used to buy the home was derived from drug transactions. JA 32-36. Ms. Goodwin filed a summary judgment motion and motion to dismiss on the grounds that the probable cause standards and the "substantial connection" standards required by *United States v. U.S. Coin and Currency*, 401 U.S. 715 (1971), were not satisfied. In that case, this Court stated:

> When the forfeiture statutes are viewed in their entirety, it is manifest that they are intended to impose a penalty only upon those who are significantly involved in a criminal enterprise.

401 U.S. 721-22.

Various circuits have mandated that the government provide evidence of "a substantial connection between the property to be forfeited and the underlying criminal activity" prior to the forfeiture of an innocent owner's property. *See, e.g., United States v. Real Property and Residence at 3097 S.W. 111th Ave., Miami, Florida*, 921 F.2d 1551, 1555-56 (11th Cir. 1991); *United States v. Santoro*, 866 F.2d 1538, 1542 (4th Cir. 1989); *United States v. One 1986 Nissan Maxima GL*, 895 F.2d 1063, 1064 (5th Cir. 1990); *United States v. Padilla*, 888 F.2d 642, 643 (9th Cir. 1989).

In this case, the district court entered a judgment virtually concluding the case without any trial or evidentiary hearings. (Pet. App. 42 n.3) The district court presumed that since the $216,000 wired to claimant's attorney was traceable to an illegal transaction and was later used to fund the balance of the $240,000 purchase price for the home, that fact alone satisfied the substantial connection requirement. (Pet. App. 24, 13-14)

The Third Circuit did not need to address the constitutional issues inasmuch as its construction of the innocent owner provision made it unnecessary. Innocent owners should be protected by 21 U.S.C. 881(a)(6) from forfeitures and evidence of a "substantial connection" to the criminal offenses should be required. Otherwise, the Constitution should require the government to establish far more than that there is probable cause to believe that proceeds allegedly traceable to a drug offense committed by someone other than the owner have tainted the property. The homes of those deemed innocent should not be seized and forfeited, as a matter of law, on so slim an allegation.

B. The Framers Of The Constitution Prohibited The Application Of The Forfeiture Laws To Forfeit The Homes Of Innocent Wives And Children In Other Contexts.

Support for the application of the pertinent constitutional provisions is found in another clause of the Constitution. The forfeiture of a home owned by an innocent spouse and her children, as sought in this case, was beyond the bounds of those punishments deemed acceptable to the framers of our Constitution.

Under English common law, traitors could be required to forfeit all of their property. Thus, the innocent heir of a traitor would be deprived of his inheritance and the lands and estate that customarily descended to him. Such a draconian forfeiture and punishment was explicitly prohibited by our Constitution. Article 3, Section 3,

Clause 2 prohibits the application of such forfeitures to the wife and children of traitors:

> The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

This Constitutional prohibition was addressed specifically to the offense of treason because it was only treason that warranted such a draconian punishment at common law. The drug forfeiture statutes as interpreted by the government in this case impose the same draconian forfeiture explicitly prohibited by the framers of our Constitution. Under the Constitution, only the person who commits treason can be deprived of his home. His wife and children cannot be deprived of their inheritance.

After the Civil War, statutes were enacted forfeiting the land and property of officers of the Confederate Army since they were deemed traitors. Despite the public call for retribution, as demonstrated by such laws, the real property to be forfeited was held not to extend beyond the life estate of the officers who had fought for the Confederacy. Thus, in *Bigelow v. Forrest*, 76 U.S. (9 Wall) 339 (1870), this Court held that

> the Act shall not be construed to work a forfeiture of the real estate of the offender beyond his natural life. It can do this neither directly nor indirectly. The punishment inflicted upon him is not to descend to his children. His heritable blood is not corrupted. It is of course necessary to give such an interpretation to the words of the statute that they should not contravene the declared intent of Congress.

76 U.S. at 352.

In *Wallach v. Van Riswick*, 92 U.S. 202, 210 (1876), the Court construed this same forfeiture statute and explained the intention of the constitutional provision:

> In England attainders of treason worked corruption of blood and perpetual forfeiture of the estate of the person attainted, to the disinherison of his heirs, or of those who would otherwise be his heirs. Thus innocent children were made to suffer because of the offense of their ancestor. When the Federal Constitution was framed this was felt to be a great hardship, and even rank injustice. For this reason, it was ordained that no attainder of treason should work corruption of blood or forfeiture, except during the life of the person attainted. No one ever doubted that it was a provision introduced for the benefit of the children and heirs alone; a declaration that the children should not bear the iniquity of the fathers.

92 U.S. at 210.

The rationale behind Article Three, Section Three of the Constitution should be considered part of the due process which governs all government takings and part of the prohibition of unreasonable searches (and forfeitures). If our Constitution was intended to prohibit the forfeiture of the estates of innocent families of traitors, it should also be deemed to protect the innocent families of drug offenders.

C. Due Process And The Fourth Amendment Require That An Innocent Owner Have The Right To An Evidentiary Hearing In Connection With The Seizure Of Her Home.

The Third Circuit in this case endorsed the Second Circuit's holding in *United States v. Premises and Real*

Property at 4492 South Livonia Road, Livonia, New York, 889 F.2d 1258 (2d Cir. 1989), that the seizure of a home pursuant to 21 U.S.C. 881 without notice and a hearing violates due process. (Pet. App. 5-6.) Similarly, in *Department of Law Enforcement v. Real Property*, 588 So.2d 957 (Fla. 1991), the Supreme Court of Florida held that due process under its state constitution requires that before real property is seized for criminal violations "that the state must provide notice and schedule an adversarial hearing for interested parties on the question of probable cause prior to any initial restraint." *Id.* at 965. But see *United States v. A Single Family Residence and Real Property Located at 900 Rio Vista Boulevard, Ft. Lauderdale, Florida*, 803 F.2d 625, 632 (11th Cir. 1986).

This Court has always provided significantly greater and special protection for a citizen's home than for personal property and has never held that a home may be seized from its owner and occupant, consistent with our Constitution, without prior notice and a hearing.[4] In *Connecticut v. Doehr*, 111 S.Ct. 2105 (1991), this Court held that state laws which permit the seizure and encumbering of a home or real property without prior notice and a hearing violate due process. Based upon this holding, the Court invalidated Connecticut's prejudgment attachment procedures. The *Doehr* decision also recognized that a

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[4] This court has held that due process permits a seizure of personal property without a prior hearing and notice when violations of the criminal laws are alleged. *See United States v. $8,850*, 461 U.S. 555 (1983); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974). Personal property is capable of moving and disappearing, however, and therefore involves different considerations than a home.

rapid post-seizure hearing could not cure the constitutional defect arising from the lack of a prior hearing. 111 S. Ct. at 2114-15. If the due process clause requires such protections from the operation of state attachment statutes, the federal government should be similarly obliged to provide at least that much protection before it seizes a home.

In this case, we submit there was no probable cause to believe that the proceeds were traceable to a drug transaction. Brenna reportedly had a boat business operating, in part, in the Caribbean which included the purchase, sale and charter of boats. JA 103; 95; 61-63. That boat business is not mentioned in the Verified Complaint and no evidence was provided to demonstrate probable cause to believe the funds for the house were not traceable to the boat business.

The sole basis for the allegation in the forfeiture Complaint that the funds to purchase the house were traceable to a drug transaction was an informant/witness named Mazocca. JA 103; 89-90. There was no demonstration that Mazocca was reliable and Mazocca, who had repeatedly violated the drug laws, received the benefit of a plea agreement from the government by providing information to further this case. JA 101, 86. Although the government agreed it would and could produce Mazocca for a deposition, and was ordered to do so, the government refused to permit him to be examined. JA 93, 105-07, 25, 26-27. Mazocca filed no affidavit to support the government's case.

While the government would not produce Mazocca, Giacobbe (the DEA agent who interviewed him) acknowledged that (1) Mazocca had no knowledge concerning

whether the money Brenna originally gave Murphy was drug money, JA 108-09; 104, and (2) Mazocca had no knowledge of Brenna's finances or sources of money in 1982. JA 104. Mazocca had apparently heard from some unidentified source that Brenna was involved in marijuana importation at some unknown time prior to the fall of 1982 but Mazocca did not know how much money, *if any*, Brenna received from such a transaction, where in the United States this reported shipment of marijuana was delivered, where it came from, or even who was involved. JA 86-89.

Murphy, the accountant who transferred the $216,000 and maintained investments for 200 or more clients, was produced by the government for a deposition. He was a government witness who had been paid $30,000 by the DEA over time. Murphy attested that he was not aware of any facts that suggested to him that the funds Brenna provided to Goodwin were "traceable to a drug transaction." JA 43-45; 70, 74.

For several years, the government neither indicted Brenna for drug trafficking nor seized the house. Brenna was, however, charged for the criminal misdemeanor of transporting currency to Murphy, without filing the proper currency transaction reports (CTR's) in late 1987. *See United States v. Brenna*, 878 F.2d 117 (3rd Cir. 1989). Brenna and Ms. Goodwin separated in late 1987. JA 32. Brenna was not criminally charged for any alleged drug transactions until May 1990, one full year after Ms. Goodwin's house was seized. Brenna's indictment, filed in 1990 (one year after the seizure) referenced no drug transactions prior to 1985. JA 34-40.

The probable cause in this case essentially amounts to "evidence" that Brenna had money in 1982; that he was allegedly involved in specified marijuana transactions in 1985; therefore all money he possessed in 1982 is probably traceable to similar drug transactions. There is only one witness (Mazocca) who provided a basis for probable cause that the proceeds used to purchase the house were traceable to a drug transaction. Yet the government refused to permit him to be deposed or to file an affidavit. This case proceeded, virtually to conclusion, based on the statement of an agent as to his recollection of the informal, unsworn interview of an unreliable informant who apparently lacked adequate information himself.

Whether or not probable cause was demonstrated, we ask this Court to hold that a seizure and forfeiture proceeding relating to the home of an innocent person must be instituted with notice and with a pre-seizure evidentiary hearing.[5] The action herein has resulted in the pendency of the seizure action for 3-1/2 years during which time Beth Ann Goodwin has been deprived of at least the property interests identified in *Connecticut v. Doehr, supra*. The violation of those constitutional clauses and the resulting prejudice to this innocent owner

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[5] The lack of prior notice and a hearing in this case was compounded by the lack of any meaningful discovery. The government refused to produce the sole witness who allegedly had knowledge of Brenna's criminal activities. (Pet. App. 33-34.) The district court reviewed the defendant's motion to dismiss and for summary judgment based on written submissions and affidavits. The district court's rulings virtually terminated Goodwin's case without any evidentiary proceedings whatsoever.

requires the dismissal of this action with prejudice, wholly apart from the statutory construction which we contend fully protects the respondent's property interests.

THE REGULATORY REMISSION AND MITIGATION PROCEDURE HAS NO BEARING ON THE CONSTITUTIONAL ASPECTS OF THIS CASE.

The government suggests that the constitutional issue has no merit since the Department of Justice (the "Department") or the seizing agency will, on occasion, remit or mitigate the impact of a forfeiture on an innocent person. The regulatory procedure for remission requires a filing with the Department or the seizing agency. At the Department, a member of the Asset Forfeiture Section of the Criminal Division prepares a report and then the Director of the Asset Forfeiture Division ("Director"), based on the report, awards the remission, partial mitigation or denies any remedy at all. 28 C.F.R. 9.3. If the seizing agency first denies the petition, then the Director cannot even accept a remission or mitigation petition. 28 C.F.R. 9.3(h).

Thus, it is the claimant's direct adversary who has the ability and the authority to resolve cases by remitting all or part of the forfeiture. The remission procedure, while formalizing the process for review, differs little from the U. S. Attorney's authority to settle any pending litigation. The Department can always settle its cases based on the merits and consideration of fundamental fairness and justice. The existence of regulations authorizing the Director to exercise some discretion over the forfeiture, thereby requiring the involvement of some

supervising individuals within the institutional adversary to review such matters, while admirable, has little bearing on the constitutional issue. The discretion to resolve cases on the merits as set forth in 28 C.F.R. 9.5 is similarly inherent in every instance where the attorneys attempt to settle a case.[6]

Even if the remission procedure involved a decision by independent personnel, the institutional interest in the success of forfeitures dictates that such administrative procedure should have no significance in the context of the due process claim. *See Ward v. Village of Monroeville*, 409 U.S. 57 (1972); *Tumey v. Ohio*, 273 U.S. 510 (1927).

The standards set forth for remission require the officer to assume a valid forfeiture. Then, if certain required facts are provided by the owner, remission may be granted. The required facts are no less stringent than those that the law requires an innocent owner to prove in court. *See* 28 C.F.R. 9.5(b). Furthermore, the remission regulations in 28 C.F.R. 9.5 do not appear to provide relief for an innocent owner when the property was acquired in whole or in part with proceeds allegedly traceable to a drug transaction.[7] Thus, to suggest that remission makes available any remedy at all for this claimant is simply erroneous.

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[6] Respondent's experience with the remission proceeding suggested that the very same individuals at DEA who were responsible for the forfeiture case were in large part responsible for the remission. The regulations explain this by requiring a report from the seizing agency. 28 C.F.R. 9.3(d).

[7] The Justice Department takes the position that such an owner has no "valid ownership". (Br. at 20) Therefore, claimants such as Ms. Goodwin could not satisfy 28 C.F.R. 9.5(b)(1).

Even if Ms. Goodwin satisfied 28 C.F.R. 9.5(b), her petition need not be granted. The determining official could decide, in his sole discretion, that mitigation, but not remission, was appropriate and therefore a monetary penalty may be extracted in return for the release of the seized property. In that regard, 28 C.F.R. 9.5(c) provides:

> . . . Mitigation may also be granted where the minimum standards for remission have been satisfied but the overall circumstances are such that, in the opinion of the determining official, complete relief is not warranted. Mitigation shall take the form of a money penalty imposed upon the petitioner in addition to any other sums chargeable as a condition to remission. This penalty is considered as an item of cost payable by the petitioner, and shall be deposited as an amount realized from forfeiture in accordance with 28 U.S.C. 524(c).

In this case, the petition for remission was denied in a sentence stating that Goodwin had not satisfactorily established that she lacked knowledge that the property was or would be involved in any violation of law. Although she had attested to these facts, the administrative procedure included no hearing of any kind. The Department's decision was presumably based upon the report of the DEA personnel who were involved in instituting the forfeiture action.

The cases suggest that a decision to remit or to mitigate is non-reviewable.[8] *See, e.g., Ivers v. United States*, 581

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[8] Presumably, the government contends that the remission decisions are non-reviewable by the courts.

F.2d 1362, 1371 (9th Cir. 1978); *United States v. One 1973 Buick Riviera Auto.*, 560 F.2d 897 (8th Cir. 1977); *United States v. One 1972 Mercedes-Benz 250*, 545 F.2d 1233, 1236 (9th Cir. 1976); *United States v. One 1961 Cadillac*, 337 F.2d 730 (6th Cir. 1964); *United States v. One 1941 Plymouth Tudor Sedan*, 153 F.2d 19 (10th Cir. 1946); *General Finance Co. of Louisiana v. United States*, 45 F.2d 380 (5th Cir. 1930). Under such circumstances, when it is simply the direct adversary making an unreviewable judgment to resolve a case, in full or in part, based on its own internal reports, provided in part by the personnel that instituted the forfeiture action in the first place, the regulatory procedure should be accorded no legal significance in this Court's consideration of the constitutional issues.

THE INNOCENT OWNER PROVISION OF 881(a)(6) SHOULD BE BROADLY CONSTRUED TO SATISFY THE CONSTITUTIONAL REQUIREMENTS AND TO PROTECT THE INTERESTS OF OWNERS WHOSE OWNERSHIP RIGHTS ARISE AFTER THE ILLEGAL ACT.

The plain language of 21 U.S.C. 881(a)(6) indicates that protection from civil forfeiture is provided to all innocent owners and not merely to innocent owners who are bona fide purchasers for value. When Congress intends to limit protection from criminal forfeiture to bona fide purchasers for value, it has expressed this intention through unequivocal language stating that relief from such forfeitures should only be available to "bona fide purchasers". *See* 18 U.S.C. 963(c) and 12 U.S.C. 853(c). It did not do so herein. As the Third Circuit

properly noted, any decision limiting the protections provided by Section 881 to purchasers, as distinct from other innocent owners, is contrary to the plain statutory language. (Pet. App. 8a-9a.)

The language of Section 881 seems designed to protect the interests of innocent wives and children as well as bona fide purchasers, whether they take from the alleged felon or the felon's transferees. The government proffers no meaningful explanation of the distinctions in the language. According to the government, despite the apparent breadth of the protection provided by Section 881, it is virtually meaningless, and far narrower than the protection offered bona fide purchasers from criminal forfeitures. There is no cited support in the legislative history that suggests Congress intended to limit protection from the civil forfeitures to a smaller class of innocent owners than are protected from criminal forfeitures. A review of the legislative history to Section 881 suggests the opposite.

The legislative history reveals that Congress intended to exempt *all* subsequent innocent owners from forfeiture under 21 U.S.C. 881, not just bona fide purchasers for value. As the Court in *United States v. One Single Family Residence*, 894 F.2d 1511, 1514 (11th Cir. 1990), noted:

> [A]s Congress escalated its offense in the ongoing "war against drugs" by expanding the scope of property subject to civil forfeiture, it coupled with the forfeiture a proviso, taken verbatim from Section 881(a)(6), protecting innocent owners. Explaining the aim of the innocent owner exception, Congress stated:

> [I]t should be pointed out that no property would be forfeited under the Senate amendment to the extent of the interest of any innocent owner of such property. The term "owner" should be broadly interpreted to include any person with a recognizable legal or equitable interest in the property seized. Specifically, the property would not be subject to forfeiture unless the owner of such property knew or consented to the fact that [the property was used for or traceable to illegal drug activities].

Joint Explanation Statement of Titles I & II, 124 Cong. Rec. S 17647, reprinted in 1978 U.S. Code Cong. & Admin. News 9518, 9522.

Senators Culver and Nunn spoke on the floor of the Senate regarding the innocent owner provision. Senator Culver explained that the innocent owner provision was added as a result of "concerns" expressed by members of the Juvenile Delinquency Subcommittee:

> Specifically, it was noted that the original language could have been construed to reach properties traceable to the illegal proceeds but obtained by an innocent party without knowledge of the manner in which the proceeds were obtained. The original language is modified in the proposed amendment in order to protect the individual who obtains ownership of proceeds with no knowledge of the illegal transaction.

Remarks of Senator Culver, 124 Cong. Rec. 23056 (July 27, 1978), *cited in United States v. Parcel of Real Prop. Known as 6109 Grubb Road, Millcreek Tp., Erie County, Pa.*, 886 F.2d

618, 625 (3d Cir. 1989) (emphasis supplied). Senator Nunn stated that the innocent owner provision was added

> to make it clear that a bona fide party who has no knowledge or consent to the property he owns having been derived from an illegal transaction, that party would be able to establish that fact under this amendment and forfeiture would not occur.

Remarks of Senator Nunn, 124 Cong. Rec. 23057 (July 27, 1978), *cited in United States v. Parcel of Real Prop. Known as 6109 Grubb Road, Millcreek Tp., Erie County, Pa.*, 886 F.2d 618, 625 (3d Cir. 1989) (emphasis supplied).

The express purpose behind the forfeiture laws is to provide a financial disincentive to participants in the drug trade. Even assuming that Congress has the power to forfeit the downstream proceeds of a drug transaction now in the hands of an innocent party, why would Congress exercise that power? What purpose does it serve? The enforcement of forfeiture actions against those deemed innocent of criminal activity or complicity therein should be rejected.

The impact of forfeiture proceedings on innocent owners and bona fide purchasers has been the subject of substantial federal jurisprudence. The results have customarily turned on the specific language of the statute and the intent of the congressional framers.

At common law, the right of forfeiture customarily did not attach until the offending person had been convicted. *Waterloo Distilling Corp. v. United States*, 282 U.S. 577, 580 (1930). As Chief Justice Marshall stated in *United*

States v. Grundy and Thornburgh, 7 U.S. (3 Cranch) 337 (1806):

> It has been proved that in all forfeitures accruing at common law, nothing vests in the government until some legal step shall be taken for the assertion of its right, after which, for many purposes, the doctrine of relation carries back the title to the commission of the offense; but the distinction, taken by the counsel for the United States, between forfeitures at common law, and those accruing under a statute, is certainly a sound one. Where a forfeiture is given by a statute, the rules of the common law may be dispensed with, and the thing forfeited may either vest immediately, or on the performance of some particular act, as shall be the will of the legislature. This must depend upon the construction of the statute.

7 U.S. at 350-51.

In rem actions premised on the theory that the inanimate object has committed the offense have been handled somewhat differently. As Justice Story stated in *The Palmyra*, 25 U.S. (12 Wheat) 1, 14-15 (1827), at common law the forfeiture of a felon's goods was a consequence of the conviction. With respect to a forfeiture *in rem*, where the goods are the offending party, no personal conviction of the owner is necessary. In *in rem* actions against goods which participated in the offense, the language of the statute determines whether the forfeiture takes place upon the commission of the offense or when the property is subjected to the forfeiture action. The statutory language is the guide. *See United States v. 1960 Bags of Coffee*, 12 U.S. (8 Cranch) 398, 404-05 (1814); *United States v. One*

Hundred Barrells Distilled Spirits, 81 U.S. (14 Wall) 44 (1872) (the language was the goods "shall be forfeited"); *United States v. Stowell*, 133 U.S. 1 (1890) ("whenever a statute enacts that upon the commission of a certain act specific property used in or connected with that act shall be forfeited," the relation back doctrine applies).

In this case, Section 881 provides that property shall be *subject to* forfeiture if it is proceeds traceable to money furnished in connection with a drug exchange. The language is not mandatory. At most, the United States has a right to assert a claim against the items of value that were exchanged for drugs *or* the proceeds therefrom in the drug dealer's possession, but not both. The filing of an action is necessary. The statute herein, insofar as it gives the United States various options to pursue (the item exchanged for drugs *or* the proceeds thereof) requires an election to be made. This statute is similar to that analyzed by the Court in *Caldwell v. United States*, 49 U.S. (8 How) 366 (1850).

The relation back doctrine was not codified and therefore did not apply to Section 881 until 1984 when the Congress amended added subsection 881(h). By then, title had already vested and was perfected in Ms. Goodwin, and the *ex post facto* revision of the statute cannot affect her rights.

Section 881 is a tool to fight crime. The criminal forfeitures and the quasi-criminal forfeitures are designed to take contraband, the tools of the drug trade, and the profits and proceeds in the hands of drug dealers. The protection offered to innocent owners in the context of an *in personam* criminal prosecution is limited to bona fide

purchasers. 21 U.S.C. 853. The protection offered to innocent owners in the context of forfeiture actions denominated as civil is logically broader. There is no rigid requirement that the innocent owner be a bona fide purchaser for value in the context of civil forfeitures; nor should there be. Congress knew how to designate such protection when it intended to. *See, e.g.*, 21 U.S.C. 853. These civil forfeiture actions often impact on others who are simply not felons and drug dealers (*i.e.*, innocent wives and children). Criminal forfeitures carry with them the constitutional safeguards of any other criminal action including proof beyond a reaonsable doubt. Since the burden of proof on the government is much lower in civil forfeitures (*i.e.*, probable cause rather than beyond a reasonable doubt), the protection offered by Congress was intended to be similarly broader.

The government recognizes that the criminal forfeiture statute protects bona fide purchasers for value. Ironically, the government suggests that the civil forfeiture statute is less flexible and less protective of the innnocent. The government's argument thus creates an anamolous result: when the prosecution proves beyond a reasonable doubt that the property is substantially related to the criminal transaction, bona fide purchasers will be protected, but when the prosecution can only establish probable cause and declines to bring a criminal forfeiture action, bona fide purchasers are not protected. We submit that is illogical.

Forfeiture statutes containing protections for innocent owners and/or bona fide purchasers have customarily been construed to include protection for those who acquired an interest in the property after the alleged

illegal event.[9] The government cites this Court to two cases where an innocent owner or bona fide purchaser exception to a forfeiture statute has been construed to provide protection only to those with an ownership interest acquired prior to the illegal act. Br. at 22. We submit that the doctrine of those cases should not be adopted by this Court.

We ask this Court to adopt the holding of the Third Circuit and the view of Judge Murnaghan who wrote in *In re One 1985 Nissan 300ZX*, 889 F.2d 1317, 1322 (4th Cir. 1989), in words pertinent here:

> I reject the view that 21 U.S.C. Sec. 881(h) forbids anyone from qualifying as an innocent owner if he or she acquired the money or property after the illegal transaction. Such an interpretation would seem impossible to square with the plain language of Sec. 881(a)(6) which expressly encompasses "proceeds traceable to . . . an exchange" of controlled substances. How can one obtain drug deal proceeds before the transaction even takes place? I see no way to reconcile the language of Sec. 881(a)(6) with the majority's implicit interpretation of Sec. 881(h).

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[9] *See United States v. One Urban Lot Located at 1 St. A-1, Valparaiso, Bayamon, Puerto Rico*, 865 F.2d 427 (1st Cir. 1989); *In re Metmor Financial, Inc.*, 819 F.2d 446, 448 n.2 (4th Cir. 1987); *United States v. One Single Family Residence Located at 6960 Miraflores Ave.*, 731 F. Supp. 1563, 1568 (S.D. Fla. 1990), *appeal dismissed*, 932 F.2d 1433 (11th Cir. 1991), *cert. granted on other issues sub nom; Republic Nat'l Bank v. United States*, 112 S.Ct. 1159 (11th Cir. 1992); *United States v. One Single Family Residence*, 683 F. Supp. 783, 787-788 (S.D. Fla. 1988); *see also Nissan*, 889 F.2d at 1322 (Murnaghan, J., concurring).

The government seeks to explain away the indisputable persuasiveness of that position by designing a hypothetical of an innocent investor whose funds are spent for drugs by his trustee. This creative example provides the government with the ability to argue that under their construction, the innocent owner provision is not necessarily meaningless. Nevertheless, the government's interpretation of the harm to be protected by the innocent owner provision finds no support in the legislative history or the case law. In no case known to counsel has this Court construed an innocent owner provision of any other forfeiture statute to protect only those persons who acquired their interest prior to the illegal act. The case law, by and large, deals with innocent owners and bona fide purchasers whose ownership arises after the illegal act. No case cited by the government involves the hypothetical example proffered by the government, and a construction of the innocent owner provision that is virtually meaningless should not be adopted either.

The government assumes that the innocent owner provision looks to the owner's state of mind *"at the time the [illegal] acts were committed."* (Br. at 23; emphasis in original) The government then argues that if its construction of 881 is rejected, a transferee who learns of the criminal transaction *after* the criminal transaction, but before the transfer, could avoid forfeiture. (Br. at 24)

This argument is based on the false premise that the innocent owner defense looks to the transferee's state of mind at the time the criminal transaction took place. The language of the statute does not dictate that result. The statute should be read to require that the owner assert his lack of knowledge of the criminal transaction at the time

of the transfer. Since Goodwin did not have any knowledge of the alleged criminal transaction until long after the transfer, she should be protected by the innocent owner clause.

The government criticizes the Third Circuit's opinion, stating that "under the Third Circuit's construction, however, property . . . can be pulled outside the statute retroactively by a transfer to an innocent third party." (Br. at 30) But the government's construction of the innocent owner defense has the same effect. Even if the innocent owner clause is limited, as the government argues, to situations where the owner held title prior to the criminal transaction, we would still be faced with the scenario where the government, having been vested with title by virtue of 881(h), would retroactively lose its title based upon the subsequent assertion of such an innocent owner's right to title.

Under other aspects of the law of real property, rights in real property can be retroactively changed. For example, a lienholder's failure to properly record or give notice can retroactively strip that lienholder of his senior status upon the subsequent recordation of what would otherwise have been a junior lien. *See generally* government's brief at n.9.

Section 881(h) should not be construed as a substantive limitation on the innocent owner defense because to do so would nullify that defense completely.

THE GOVERNMENT'S CONTENTION THAT GOODWIN IS A DONEE RATHER THAN A BONA FIDE PURCHASER SHOULD HAVE NO LEGAL CONSEQUENCE.

The government has labeled Beth Ann Goodwin as a "donee" and argues that her ownership rights as a donee are entitled to less protection than the identical ownership rights of a bona fide purchaser. Br. at 36, n.13. The government's argument suffers from two flaws: first, it has no basis in the statutory language. Second, Goodwin is not just a donee.

The government does not point to any statutory language to support the distinction between donees and purchasers.[10] Rather, the government fears that if donees were protected by the innocent owner defense, "[d]rug traffickers could shelter their assets by giving them to friends and relatives while still retaining some degree of enjoyment and control." Brief at p. 36, n. 13. Such a policy-oriented argument has a hollow ring where, as here, the proported donor *has not* retained control over the property. (Goodwin barred Mr. Brenna from the premises nearly five years ago.)

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[10] Indeed, the statutory language of the various forfeiture statutes indicates that no such distinction exists. In the criminal forfeiture statute, 21 U.S.C. 853, Congress provided certain remedies specifically for bona fide purchasers. The civil forfeiture statute, 21 U.S.C. 881, by comparison, makes no such distinction, creating one broad remedial scheme for all innocent owners, regardless of their status as purchasers or donees.

Furthermore, the government's scenario is largely illusory. If a drug trafficker wanted to shelter assets, but still retain control over them, it is unlikely that he would make an outright gift to a third party. It is far more likely that he would create a symbiotic arrangement such as a joint tenancy. And despite the government's concerns for the circumvention of the forfeiture statute, the courts have preserved the innocent owner defense of the recipient of such joint tenancies. *See, e.g., United States v. Parcel of Real Property Known as 1500 Lincoln Avenue*, 949 F.2d 73 (3rd Cir. 1991); *United States v. Certain Real Property Located at 2525 Leroy Lane*, 910 F.2d 343 (6th Cir. 1990).

Even if there were a statutory distinction between donees and purchasers, the government is incorrect in denominating Goodwin as a donee. Concededly, she is not a bona fide purchaser in the classical sense. That is, she did not receive the funds pursuant to a written contract in exchange for a pre-determined market-value consideration. But Goodwin was more than just the fortuitous beneficiary of Brenna's largess. Rather, she provided Brenna with the full panoply of marital privileges. She was Brenna's "cohabitant" and, under New Jersey law, she was entitled to certain property rights. *Kozlowski v. Kozlowski*, 164 N.J. Super. 162 (Ch. Div. 1978), *aff'd*, 80 N.J. 378 (1979); *Crowe v. DeGioia*, 90 N.J. 126 (1982), *on remand*, 203 N.J. Super. 22 (App. Div. 1985).

In *Kozlowski*, the parties lived together for nearly 15 years. After defendant left the relationship, the plaintiff brought an action to recover her share of the assets which the defendant had accumulated during the relationship, plus the reasonable value of services rendered for his benefit. The trial court stated:

> The dilemma may be simply stated: Is there any remedy available under our law for a woman who has devoted 15 or more years living with a man, for whom she provided the necessary household services and emotional support to permit him to successfully pursue his business career and for whom she has performed housekeeping, cleaning and shopping services, run the household, raised the children, her own as well as his, all without benefit of marriage; a woman who was literally forced out of the household with no ongoing support or wherewithal for her survival?

164 N.J. Super. at 170. The court enforced plaintiff's claim, concluding:

> This court could not contenance the unconscionable result which would obtain should all relief be denied this plaintiff who was . . . without means of support or assets, and with little hope of developing support opportunities.

164 N.J. Super. at 178.

In *Crowe v. DeGioia*, the parties had lived together in a relationship akin to marriage for over 20 years. Relying on equitable principles, the trial court granted plaintiff *pendente lite* support payments. In affirming that decision, the Supreme Court of New Jersey stated: "[T]he inability to fit plaintiff's claim for temporary relief into the conventional category of a matrimonial action is not a bar to relief. To achieve substantial justice in other cases, we have adjusted the rights and duties of parties in light of the realities of their relationship." 90 N.J. at 135. To that end, New Jersey courts will base recovery on *quantum meruit* or employ equitable remedies such as constructive

or resulting trusts. 203 N.J. Super. at 36. Thus, in affirming the trial court's decision to award Ms. Crowe *pendente lite* support payments, the Supreme Court of New Jersey stated:

> Increasing numbers of unmarried couples live together . . . Although plaintiff need not be rewarded for cohabitating with defendant, she should not be penalized simply because she lived with him in consideration of a promise for support. Our endeavor is to shape a remedy that will protect the legally cognizable interests of the parties and serve the needs of justice.

90 N.J. at 135.[11]

In this case, Goodwin and Brenna cohabited for seven years. She cooked, cleaned and kept house for him. They lived together in all respects as husband and wife. Under the circumstances, had Brenna not given Goodwin the money to purchase the house, she would have been

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[11] New Jersey has long recognized the special interest a mother and her children have in the retention of their home. In *Wheeler and Green v. Kirtland*, 23 N.J. Eq. 13 (N.J. Ch. 1872), *modified*, 24 N.J. Eq. 552 (N.J. Ch. 1873), creditors of the husband's business sought to place a lien on the home owned by the wife. The husband had gifted the money to his wife which she used to purchase their family home. The wife was unaware that her husband was insolvent. The court opined that if a donee in a marital relationship receives money in good faith, there are no grounds to create a trust for creditors while the property is kept in good faith. *Id.* at 18-19. Although her husband gave her a large part of the purchase money which she used to pay for the home, the court found no authority for the creation of a resulting trust from such facts. *Id.* at 22.

entitled to similar amounts.[12] The Solicitor's office has chosen to petition the Court in this case perhaps, in part, because Ms. Goodwin is not formally married and can thus be deemed a less sympathetic recipient of a home. But whatever decision is reached in this case will impact equally on innocent wives and children brought up in the context of formal wedding vows.

THE GOVERNMENT'S POSITION THAT THE PROTECTION AFFORDED BY CONGRESS TO INNOCENT OWNERS IS INAPPLICABLE TO PROTECT BONA FIDE PURCHASERS, INNOCENT WIVES AND CHILDREN FROM THE FORFEITURE OF THEIR HOMES WARRANTS REJECTION IN THE STRONGEST TERMS.

The government expresses concern that any construction of innocent owners that includes the wives and children of those allegedly involved in drugs would permit felons to enjoy the benefits of the drug trade. To ensure that this does not happen, the government asks this Court to sacrifice the interests of both innocents and bona fide purchasers.

A civil forfeiture begins with a showing of *only* probable cause. In this case, that amounted to very little. The district court and the appellate court grounded their findings that probable cause existed on an indictment returned a full year after the seizure, which indictment

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[12] At the least, to the extent of the value of the improvements, taxes, cost of maintenance and other payments she may have made on behalf of the property, she stands in a different position than a mere donee.

referenced no drug transactions prior to 1985, three years after the home purchase herein. Thereafter, the burden was placed on the innocent owner to prove a negative, *i.e.*, that the proceeds provided by someone else were not traceable to a drug transaction. When a seizure occurs seven years after the purchase and eight or more years after the alleged undated and nebulously identified illegal transaction, which transaction involved only others, that burden is impossible. Even the families of alleged drug dealers are entitled to be treated with fundamental fairness. We submit that a narrow reading of the innocent owner provision of the drug forfeiture laws will produce fundamentally unfair results in this case and others.

Most citizens, including Ms. Goodwin, do not have the financial ability to litigate against the United States. When a car or a boat or even a home is seized, the value of the citizen's equity may well be inadequate to finance the exhaustive efforts needed to retreive the property. The seizure itself will often end the case. Moreover, the government's seizure of a car or boat or even a home (particularly if left unoccupied) will, in short order, result in substantial depreciation of the asset. Even if the seized asset is later returned to the innocent owner, substantial damage is done by virtue of the government's seizure.

The zeal with which the government pursues its asset forfeiture program is substantiated by this seizure, seven years after the purchase, and the conceded use of Ms. Goodwin's own immunized testimony to draft the forfeiture Complaint. Many U.S. Attorney's offices in the United States, including the U.S. Attorney's office in New Jersey, have asset forfeiture divisions whose sole purpose is to maximize the financial recovery to the government.

Unless the government makes efforts not to include innocent owners in their seizure nets, irreparable damage to innocent citizens is inevitable. We ask this Court to preserve Congress' intent in passing Section 881 – to give the interests of all innocent citizens more weight than the interests of the government in maximizing its financial return from its asset forfeiture program.

CONCLUSION

For the foregoing reasons, the judgment of the Court below should be affirmed and/or the application of this action to this respondent should be held to be in violation of the Constitution.

Respectfully submitted,

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No. 91-781

In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA, PETITIONER

v.

A PARCEL OF LAND, BUILDINGS, APPURTENANCES AND IMPROVEMENTS KNOWN AS 92 BUENA VISTA AVENUE, RUMSON, NEW JERSEY, AND BETH ANN GOODWIN

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1. a. Respondent Goodwin devotes scant attention to the issue of statutory construction on which the Court granted certiorari in this case: whether the recipient of a gift purchased with drug proceeds can assert an "innocent owner" defense to forfeiture under 21 U.S.C. 881 (a)(6). Rather, she devotes a good part of her brief to arguing that (1) due process and the Fourth Amendment require that an innocent owner have an evidentiary hearing before seizure of a residence (Resp. Br. 21-26); (2) the district court erred in finding probable cause to believe that the property was purchased with the proceeds of a drug transaction (*id.* at 12-13 n.3, 24-25); and (3) the government improperly relied on respondent's immunized testimony in establishing probable cause (*id.* at 3-4 nn.1-2). All of these contentions were presented to this Court in respondent's cross-petition for a writ of cer-

tiorari in this case, which this Court denied. *Goodwin* v. *United States*, cert. denied, 112 S. Ct. 1264 (1992). These questions are not properly before the Court.[1]

b. Respondent also maintains (Br. 6-12)—for the first time in this litigation—that her residence does not qualify as drug "proceeds" within the meaning of Section 881(a)(6).[2] Respondent claims that the term "proceeds" should include only "proceeds in the hands of the criminal defendant" and not "items that are transferred from * * * a drug dealer to others." Br. 11. She suggests that if a third party obtains proceeds from a drug dealer and uses that money to buy property, the property is not itself proceeds subject to forfeiture under the statute. The district court implicitly rejected this position, Pet. App. 21a-25a, and respondent did not challenge that finding in the court of appeals or before this Court in her brief in opposition to certiorari or in her cross-petition for a writ of certiorari. The question is therefore not properly presented.

In any event, respondent's contention is plainly wrong. Section 881(a)(6) separately provides for the forfeiture of anything of value "furnished or intended to be furnished * * * in exchange for a controlled substance" *and* "all proceeds traceable to such an exchange." See 1 D. Smith, *Prosecution and Defense of Forfeiture Cases* ¶ 4.03[4][a], at 4-66 (1991) (noting that Section 881(a)(6) distinguishes between "the cash directly acquired in exchange for the drugs" and items obtained or purchased with that money). The former category covers the funds that Joseph Brenna obtained in exchange for

[1] Respondent's argument based on U.S. Const. Art. 3, § 3, Cl. 2 (Resp. Br. 19-21) is a bit far afield; this case does not involve punishment for treason.

[2] In an apparent typographical error, respondent's brief states that Goodwin "severed her relationship with Brenna in late 1982 and barred him from the property. J.A. 32." Br. 2. The cited page of the joint appendix confirms that the alleged parting of the ways did not occur until late 1987, five years after the house was purchased.

drugs and subsequently gave to respondent Goodwin. Those funds did not lose their character as money "furnished * * * in exchange for a controlled substance" by being transferred to respondent Goodwin, who received the money as a gift from Brenna. Indeed, respondent appears to acknowledge that "the thing itself"—that is, the item tainted by the original transaction—is forfeitable regardless of the hands in which it is found. See Resp. Br. 8 (quoting *United States* v. *Grundy & Thornburgh*, 7 U.S. (3 Cranch) 337, 354 (1806)).

The residence that respondent Goodwin purchased with the drug money received from Brenna is also subject to forfeiture as "proceeds traceable to [a drug] exchange." That separate and alternative forfeiture provision would be superfluous if Congress had meant to provide for forfeiture only of the direct profits of a drug transaction, but not for items obtained or purchased with money derived from drug transactions. Moreover, if items purchased with drug profits were not forfeitable, a drug dealer could easily shelter drug profits from forfeiture—and wholly defeat Congress's intent—simply by exchanging them for other assets.[3]

[3] Contrary to respondent's implication (Br. 7-8), this Court's decision in *United States* v. *Grundy & Thornburgh*, *supra*, provides no support for the proposition that there can never be a valid forfeiture of an "article for which [drug profits are] exchanged," but only of the profits directly derived from a drug sale. The statute at issue in that case did not provide for the forfeiture of "proceeds" of an illegal activity; rather, it authorized the forfeiture of a "vessel * * * or of the value thereof, to be recovered * * * of the person" making a false registration of the vessel. See 7 U.S. (3 Cranch) at 350. The Court construed the statute to require the United States to elect between forfeiture of the falsely registered vessel or of money received from the sale of the vessel. In dictum, the Court suggested that the statute would not permit the forfeiture of "any article for which the thing may be exchanged" by the owner making the false registration if that exchange took place before enforcement of the forfeiture. 7 U.S. (3 Cranch) at 354. In contrast, Section 881(a)(6), by its express terms, covers forfeiture of items exchanged for the controlled substance, as well as proceeds traceable to such

Furthermore, nothing in the statute suggests that "proceeds" are limited to derivative items in the hands of drug dealers, and lose their character as proceeds when found in the hands of third parties. Certainly, there is no basis in the statute for distinguishing between items purchased with drug profits by the drug dealer himself or by a third party who has received the drug profits as a gift. See Joint Explanatory Statement accompanying the Psychotropic Substances Act of 1978 (Pub. L. No. 95-633, 92 Stat. 3768), 124 Cong. Rec. 34,671 (1978) (cited at Gov't Br. 4 n.1) (Section 881(a)(6) authorizes the forfeiture of drug profits that are "commingled with other assets, involved in intervening legitimate transactions, or otherwise changed in form"). Thus, when respondent Goodwin purchased her residence with drug money provided as a gift by Brenna, the residence became "proceeds traceable to [a drug] exchange" and was forfeitable under Section 881(a)(6).[4]

2. a. Turning to the question that *is* properly presented in this case, the crux of the government's position is that a person acquiring property after the forfeitable of-

an exchange. *United States* v. *Farrell*, 606 F.2d 1341 (D.C. Cir. 1979), see Resp. Br. 8-9, 10, is readily distinguishable on the same basis.

[4] Respondent maintains (Resp. Br. 9-11) that it is necessary to permit individuals acquiring tainted proceeds to assert innocent ownership under Section 881(a)(6) because that provision authorizes the forfeiture of property involved in the entire chain of transactions resulting from the initial exchange of drug profits. The scenarios posited by respondent, however, are more theoretical than real, since the government does not ordinarily seek forfeiture of tainted assets in the hands of innocent third parties resulting from an exchange that generates "derivative proceeds" that can be seized from drug dealers. See Gov't Br. 36 n.13. In this case, however, the transaction generated no forfeitable assets in the hands of the drug dealer: here, Brenna made a direct gift of drug profits to respondent Goodwin, which she used to purchase the house that she then shared with Brenna. The direct benefit Brenna derived from his gift illustrates how readily drug dealers could circumvent the forfeiture provisions if respondent's interpretation were adopted.

fense cannot assert a statutory innocent ownership defense, because Section 881(h)—the relation-back provision—prevents that person from becoming an "owner," innocent or otherwise. Two amici attempt to discredit the government's reading of the statute by focusing on "exactly what property is subject to [21 U.S.C. 881(h)]." Br. of Dade County Tax Collector, et al. (Dade County Br.) 11; Br. of American Land Title Ass'n, et al. (ALTA Br.) 11. However, in asserting that "the relation-back provision of section 881(h) does not apply to an innocent owner's property" (ALTA Br. 11; Dade County Br. 12), the amici simply restate the Third Circuit's theory of the statute, which is that "property described in subsection (a)"—that is, property to which Section 881(h) applies to vest title in the United States upon commission of the forfeitable offense—does not include property that subsection (a) excepts from forfeiture in the innocent owner proviso.

This theory fails because Section 881(h) applies by its express terms to "property described in subsection (a)," and property subject to the innocent owner provision of Section 881(a)(6) is necessarily "property described in subsection (a)." The innocent owner proviso specifies that a certain subcategory of "property described in subsection (a)" shall not be subject to forfeiture, but the proviso certainly does not state that the subcategory of property is somehow not "property described in subsection (a)"—it plainly is, or else there would be no reason to except it from forfeiture in the first place. Applying both Section 881(h) and the innocent owner proviso to the property described in subsection (a)(6) means that property that belonged to someone other than the drug dealer at the time it was used for illegal purposes can be reclaimed by its (former) owner and ultimately exempted from forfeiture if that owner can demonstrate innocence.

Respondent argues (Br. 38) that permitting a person who acquires property *after* the offense (and after the relation-back Section operates to vest title in the United

States) to reclaim the property as an innocent owner does no more violence to the statute than "the scenario where the government, having been vested with title by virtue of 881(h)," loses its title based on an assertion of innocence by a person who "held title prior to the criminal transaction." This line of reasoning ignores the fundamental difference between persons acquiring title before and after the events giving rise to forfeiture. A person whose interest in property predates the forfeitable offense was an "owner" of that property, within the meaning of the statute, before it ever became subject to forfeiture. Because that person has a valid ownership interest up to the moment that the property becomes subject to forfeiture, he can invoke the exemption from relation-back, and reclaim his property, at the very point at which relation-back would otherwise be brought to bear to deprive him of his property interest.[5]

In contrast, a person who acquires property *after* the forfeitable offense occurs cannot invoke the innocent

[5] Relying on *United States* v. *Stowell*, 133 U.S. 1 (1890), amicus ALTA (Br. 14) suggests that an innocent owner defense limited to persons with a prior interest in property is superfluous because "the common law relation back doctrine did not defeat the rights of a claimant who acquired his interest in the property prior to the time of the illegal activity giving rise to the forfeiture." This assertion is patently wrong, and rests on a fundamental misreading of *Stowell*. The Court in that case affirmed that the common law relation-back doctrine applies with full force regardless of the identity of the property-holder and his method of acquisition, but found that the specific statutes at issue—which concerned the forfeiture of unlawful distilleries and the premises upon which they operated—excepted from forfeiture "the interest of an innocent mortgagee or other person having a lien on the lot or tract of land on which the distillery is situated." 133 U.S. at 15; see also *id.* at 12 (emphasis added) (statute providing for forfeiture of "all the right, title and interest * * * of every person who *knowingly* has suffered or permitted the business of a distiller to be there carried on"). See American Bankers Ass'n (ABA) Br. 12 (emphasis added) (noting that the Court in *Stowell* recognized "*statutory* protection for innocent owners"); Amicus Federal Home Loan Mortgage Corp. (FHLMC) Br. 17 (discussing innocent owner defense in *Stowell* as matter of statutory construction).

owner proviso to block the effect of the relation-back doctrine at the very point in time that it operates, because that person does not even acquire the interest in property that would be the basis for invoking the exception until after Section 881(h) vests title to the property in the United States. In effect, that person does not even enter the picture until after title has passed from the original owner to the United States at the time the offense is committed. Thus, a person acquiring the property *after* the events giving rise to forfeiture cannot even become an "owner"—or qualify as an innocent owner—unless title fails to vest in the United States before the acquisition occurs, so that the person can take good title from the drug dealer. This would require that operation of relation-back be suspended for some period after the events giving rise to forfeiture, until such time as the third party acquires the property. The statute, however, expressly provides that "[a]ll right, title, and interest" in the subject property vests in the United States at a specific point in time: "upon commission of the act giving rise to forfeiture." 21 U.S.C. 881(h). Thus, the third-party transfer—and the corresponding exemption from the relation-back doctrine—come too late. By the time the property is conveyed to another party, title has already passed from the drug dealer to the United States, and cannot validly be acquired by any other person.[6]

[6] Respondent and amici rely on legislative history consisting almost entirely of floor remarks by sponsors of the amendment that became Section 881(a)(6). See Resp. Br. 30; Dade County Br. 16; ALTA Br. 11-12; FHLMC Br. 13. As we have recognized, Gov't Br. 35 n.12, some of the legislators' remarks during the floor debates reflect a belief that the statute exempts from forfeiture the property of some individuals acquiring drug proceeds after the acts giving rise to forfeiture. That view, however, cannot be squared with the language and structure of the statute that was actually enacted. Such floor remarks cannot be permitted to stretch the term "owner" to cover a category of individuals who are not, and never have been, owners under the well-established relation-back principle, which applies with full force to forfeitures under Section 881(a)(6).

Amici Dade County (Br. 24-25) and FHLMC (Br. 14-15) also rely on the Senate Report accompanying the bill that added Section

b. Respondent and amici do not even attempt to explain how the statutory test for innocence, which looks to the claimant's awareness of the illegal acts giving rise to forfeiture at the time they occur, fits in with their position that persons acquiring property *post delicto* may assert the innocent ownership defense. They fail to come to grips with the government's observation that, because the statute permits anyone who was unaware of the offense at the time it occurred to show "innocence" under the statute, persons acquiring property after the offense was committed could keep their property even if they were fully aware of its illegal source at the time of the transfer. See Gov't Br. 23-27. In the only brief even to address this aspect of the statute, Amicus Federal Home Loan Mortgage Corp. (FHLMC), Br. 11, insists that the person's "innocence" should be assessed as of "the time the property is acquired," but makes no effort to explain how the language of the statute can plausibly be construed to achieve this result.

c. Amici place great emphasis on the argument that the innocent owner exception must apply to property acquired after the offense giving rise to forfeiture, because

881(h) to the civil forfeiture statute in 1984. See Gov't Br. 19-20 & n.4. However, the remarks quoted in the Dade County Br. 24 (see S. Rep. No. 225, 98th Cong., 2d Sess. 200-201 (1984)), do not refer to the amendment that became Section 881(h); rather they pertain to the amendment codified at 18 U.S.C. 1963(c)—the criminal forfeiture section of RICO—which differs in important respects from Section 881 (see Gov't Br. 31 n.10) by providing forgiveness for certain post-offense transferees. Likewise, Amicus FHLMC (Br. 14-15) reprints a portion of a law review article that erroneously states that remarks in the Senate Report concerning Section 1963(c) were incorporated by reference into the portions of the Report commenting on Section 881(h). However, the portion of the Senate Report that the law review article describes as incorporating by reference the commentary on Section 1963(c), see S. Rep. No. 225, *supra*, at 211-212, has nothing to do with Section 881(h), but rather concerns the amendment to 21 U.S.C. 853(c), the *criminal* forfeiture statute, which contains the same language as Section 1963(c). Section 881(h) is discussed in other parts of the 1984 Senate Report, see S. Rep. No. 225, *supra*, at 196, 215.

it is impossible to acquire "drug proceeds" until after the transaction takes place. See ABA Br. 14-15; FHLMC Br. 9. As we pointed out in our opening brief (Br. 27 n.8), that argument rests on the fallacious assumption that the assets in question must have acquired their character as "drug proceeds" before they were transferred to the party asserting innocent ownership, rather than at some later point. Nothing in the statute mandates that assumption. Thus, while it is "obvious * * * that one cannot 'own' the proceeds of an illegal act prior to the commission of the illegal act," ABA Br. 14, it is also irrelevant, since the statute clearly allows for the assertion of an innocent owner defense with respect to previously untainted property that is later transformed into property subject to forfeiture.[7] If that transformation

[7] Amicus ALTA, see Br. 12-13 & n.6, objects that, if the government's view in this case prevails, the Section 881(a)(6) innocent owner exception will not even apply to the majority of proceeds in the hands of third parties at the time the government attempts to forfeit the property. This claim, however, greatly exaggerates the scope of the issue presented in this case. A holding in the government's favor here would directly affect only proceeds that third parties receive as gifts; this case does not present the question whether assets acquired in other ways would be exempt from coverage of the innocent owner proviso. See Gov't Br. 36 n.13.

However, even if the majority of proceeds in the hands of third parties would not fall within the innocent owner exception, that would not constitute a persuasive reason to ignore the statute's plain language by expanding on the scope of the proviso. Contrary to respondent's and amici's suggestion (see Resp. Br. 32; ABA Br. 8-9; ALTA Br. 13; FHLMC Br. 10), there are sound reasons to accord different statutory treatment to property acquired before, as opposed to after, the offense giving rise to forfeiture. As acknowledged in the brief of amicus ABA, at 7 & n.7, the purpose of drug forfeiture laws is to "take the profit out of drug trafficking" and to ensure that "crime does not pay." Those goals will be undermined if drug dealers can curry favor or enjoy the use of their ill-gotten gains by distributing their wealth to family members, companions, or friends, innocent or otherwise. See Gov't Br. 42. Beyond that, however, a law providing for the forfeiture of "tainted" assets, wherever found, can also be expected to attenuate the finan-

occurs unbeknownst to the owner, the owner may assert the innocent owner defense to forfeiture.

d. Respondent and amici also question the basis for the disparity in the scope of the exception for innocent third parties in some criminal statutes and in the civil forfeiture provision. See Resp. Br. 32-35; Dade County Br. 17-21; ABA Br. 7; FHLMC Br. 15. As discussed in our opening brief, at 31 & n.10, 32-34 n.11, the relation-back provision that was incorporated into certain criminal forfeiture statutes in 1984 contained an explicit exemption for the property of innocent bona fide purchasers of tainted assets. See 21 U.S.C. 853(c); see also 18 U.S.C. 1963(c). The relation-back provision that was simultaneously added to the civil statute, 21 U.S.C. 881 (h), does *not* contain this language. Cf. *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."); *Gozlon-Peretz* v. *United States*, 111 S. Ct. 840, 847 (1991); *General Motors Corp.* v. *United States*, 496 U.S. 530, 541-542 (1990).

As already discussed, see Gov't Br. 33 n.11, Congress's failure to create identical exceptions under the criminal and civil statutes is best explained by reference to the historical differences between *in personam* and *in rem* forfeitures, which might well account for Congress's greater attention to third-party interests in the criminal context. What amici conveniently overlook is that, under respondent's view of Section 881(a)(6), recipients of gifts of drug proceeds such as respondent—who are not eligible to invoke an innocence exception under the criminal statute—would be able to do so under the civil statute. There is no apparent reason why Congress would choose

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cial advantages of drug dealing by making relatives, merchants, and others wary of doing business with persons who profit from the drug trade.

to protect donees in one statute but not in the other, and neither respondent nor amici provide one.

3. Respondent fails even to address the common law background of the relation-back doctrine.[8] As explained in our opening brief, that "settled doctrine" establishes that title to forfeit property vests in the United States at the time of the act giving rise to forfeiture, and that "it is not in the power of the offender * * * to defeat the forfeiture by any subsequent transfer of the property." *United States* v. *Stowell*, 133 U.S. at 16-17; *Henderson's Distilled Spirits*, 81 U.S. (14 Wall.) 44, 57-58 (1871). Congress codified this doctrine in plain terms in Section 881(h). Because "[s]tatutes which invade the common law * * * are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident," *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779, 783 (1952), and because this Court has specifically confirmed the presumption that the relation-back doctrine applies to forfeiture statutes unless the statutory language "show[s] a different intent," *Henderson's Distilled Spirits*, 81 U.S. (14 Wall.) at 57, the "innocent owner" proviso should be construed—consistent with the relation-back doctrine—as limited to those with an ownership interest antedating the events giving rise to forfeiture.

4. a. Respondent and amici contend that this Court must reject the government's construction of Section 881(a)(6), because it "raise[s] serious constitutional problems" by depriving some holders of after-acquired property of their constitutional rights to due process of law. Resp. Br. 27; ALTA Br. 22; Dade County Br. 26-27. Adopting the government's construction of the statute, however, will not result in the violation of the substantive due process rights of any person who ac-

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[8] Respondent's only response to the government's reliance on *United States* v. *1960 Bags of Coffee*, 12 U.S. (8 Cranch) 398 (1814), see Gov't Br. 16-17, is to quote from the dissent in that case. Resp. Br. 16-17.

quires property *after* it becomes subject to forfeiture, even if that person is "exceptionally innocent" as described in this Court's dictum in *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 689-690 (1974). First, all persons in that category are eligible to request equitable remission or mitigation of forfeiture. See Gov't Br. 40 n.16. Thus, it is entirely possible that no person who would be eligible to assert a *Calero-Toledo*-based claim of unconstitutional deprivation would ever have occasion to do so, for the simple reason that no person in that category may ever be denied remission.[9]

In any event, as we noted in our opening brief, at 40 n.16, the Court's discussion in *Calero-Toledo* concerned "owners" as the government construes that term in Section 881(a)(6)—that is, persons acquiring property *before* the events triggering forfeiture. We seriously doubt that a person receiving "tainted" property from a drug dealer after title to that property has passed to the United States by operation of law could assert a constitutional claim to that property. The common law has long recognized that there are instances in which a person cannot take good title from one who does not possess it. For example, no person, however unaware of the source of the property, can acquire good title to stolen goods as against the original owner.[10] In addition, the recipient

[9] Respondent also claims (Br. 15-16) that she, in particular, will be deprived of her constitutional right to due process of law under the Court's dictum in *Calero-Toledo* if Section 881(a)(6) is not construed to permit her the opportunity to establish her innocence, and regain her property, in the judicial forfeiture proceeding. This argument was not presented to, or addressed by, the courts below, see Resp. C.A. Br. 14-38; Pet. App. 1a-35a, and thus is not properly before this Court. In any event, that claim is unripe because the adjudication of forfeiture of her property has not been finalized and because the merits of her argument depend on resolution of her claim of innocence, which would require judicial fact-finding concerning her degree of awareness of the crimes underlying the forfeiture.

[10] 77 C.J.S. *Sales* § 295 (1943); 73 C.J.S. *Property* § 34 (1983); see, *e.g.*, *State Farm Mutual Automobile Ins. Co.* v. *Wagnon*, 304 So. 2d 216, 220 (Ala. Civ. App. 1974) ("[a] person who has stolen goods of another cannot pass title thereto to another, whether such other knew, or did not know, that the goods were stolen"); *Barry Industries, Inc.* v. *Aetna Casualty & Surety Co.*, 302 A.2d 61, 63 (D.C. 1973); *Schrier* v. *Home Indemnity Co.*, 273 A.2d 248, 250 (D.C. 1971).

of a gift cannot take good title if the donor did not own the property.[11] These established rules of property law have never been thought to create constitutional difficulties; in the same vein, the refusal to recognize an ownership interest in property acquired from a drug dealer—to whom, by operation of a valid statute, it does not belong—cannot possibly violate the Constitution.

b. Because no person who acquires property that has previously become subject to forfeiture by reason of a past offense has a constitutional right to retain that property, there is no merit to amici's assertion that the procedures for obtaining remission and mitigation of forfeiture are inadequate to protect those persons' constitutional rights. Although a person in possession of property may well be entitled to a finding of probable cause that the property represents the proceeds of a drug transaction, that finding, once made, establishes a defect in title that deprives the individual of any further claim to the property. The person holding the property has no further constitutional right to prove his innocence in court, or in any other proceeding.

But even assuming that an "exceptionally innocent" person who has acquired tainted property could claim a *Calero-Toledo*-based right to avoid forfeiture of the property, the procedures available to that person for seeking the return of the property would still be constitutionally adequate. That person may file a petition for remission and mitigation of forfeiture. The regulations governing disposition of claims for remission require the pertinent agency to conduct an investigation of the merits of the

[11] See 38 C.J.S. *Gifts* § 32 (1952); *Whidden* v. *Johnson*, 54 So. 2d 40 (Fla. 1951); *Smith* v. *Barrick*, 85 N.E.2d 101 (Ohio 1949); *General Credit Corp.* v. *Moore*, 260 N.W. 368, 369 (Neb. 1935).

petitioner's claims. The Attorney General must consider the results of that investigation as well as any materials submitted by the petitioner before making a decision. 28 C.F.R. 9.3(b)(2), (c) and (d). There is no limit on the information or evidence that may be submitted in support of a petition for remission. If the petition is denied, a petitioner may request reconsideration based on new evidence. 28 C.F.R. 9.2(k). Although the regulations do not provide for an evidentiary hearing, see 28 C.F.R. 9.3(d), there is no reason to believe that the "risk of error" with regard to matters bearing on remission is so great without a face-to-face hearing that such a hearing is constitutionally required. See, *e.g.*, *Mathews* v. *Eldridge*, 424 U.S. 319, 344-345 (1976); *Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532, 545-546 (1985).[12]

c. Amici also object to the administrative procedures for equitable remission and mitigation of forfeiture on the ground that the Attorney General's decision whether to return forfeitable property is largely discretionary and unreviewable (Resp. Br. 28; ALTA Br. 17-20), the test

[12] Respondent's and amici's procedural due process objections appear to be directed in part at the relationship between the timing of the "deprivation" of property subject to forfeiture and the point at which the property-holder receives a "hearing" on the issue of innocence. For example, respondent finds fault with the procedures afforded persons in her position prior to seizure of their property. See Resp. Br. 21-23. Although an initial seizure by the government does effect a significant "deprivation" of property, the procedural defect of which respondent complains—that the opportunity to prove innocence through a petition for equitable remission and mitigation, in effect, comes too late—would not be cured by interpreting Section 881(a)(6) to permit persons holding after-acquired property to assert innocence in court, since the judicial forfeiture proceeding will necessarily take place *after* the property is seized. For this reason, the Court's decisions in *Fuentes* v. *Shevin*, 407 U.S. 67 (1972), and *Connecticut* v. *Doehr*, 111 S. Ct. 2105 (1991) (see Resp. Br. 20-25; ALTA Br. 24), which concern the adequacy of procedures provided prior to the seizure of property, are inapposite to the issue before this Court—which concerns the setting in which innocent owner defense can be asserted *after* property is seized.

for proving "innocence" under the remission regulations is more exacting than the standard applied in some jurisdictions under the statute (see ALTA Br. 20; ABA Br. 11), the Attorney General is not a sufficiently impartial decision-maker (Resp. Br. 27; ALTA Br. 23), and no attorney's fees are available. None of these objections have force, nor would they justify this Court's misreading the scope of the statutory innocent owner defense.

The fact that the Attorney General's remission decision is discretionary and, in most cases, effectively unreviewable, gives rise to no constitutional concerns so long as the outcome of the decisionmaking process is consistent with constitutional requirements. For the same reason, it is of no consequence that the eligibility standards for equitable remission are somewhat more demanding than the statutory test for innocent ownership in some jurisdictions, since the remission regulations incorporate a standard that meets the requirements of the Constitution as suggested in the *Calero-Toledo* dictum. See Gov't Br. 40 n.16. Further, although the broad grant of discretion to the Attorney General would make judicial review effectively unavailable in most cases, the courts would presumably have the power to entertain colorable claims that the denial of remission or mitigation in a particular case was for an unconstitutional reason. See *Wade* v. *United States*, 112 S. Ct. 1840, 1843-1844 (1992); 2 D. Smith, *Prosecution and Defense of Forfeiture Cases* ¶ 15.04, at 15-26 (1991).

Finally, although the decision whether to grant remission or mitigation of forfeitable property will affect the size of the Assets Forfeiture Fund, see 28 U.S.C. 524(c)(1)-(10), that does not give rise to an unconstitutional conflict of interest under this Court's decisions in *Tumey* v. *Ohio*, 273 U.S. 510 (1927), or *Ward* v. *Village of Monroeville*, 409 U.S. 57, 59 (1972). The compensation received by government officials involved in processing remission petitions is not dependent on the outcome of their decisions nor on the size of the Assets Forfeiture

Fund, cf. *Tumey*, 273 U.S. at 520, 523. The Assets Forfeiture Fund may be used only for specified purposes, see 28 U.S.C. 524(c), and constitutes an insubstantial portion of the amounts generally available to the Attorney General for Department of Justice activities. The Attorney General is not charged with raising revenue or with ensuring a source of financial support for his own department. Cf. *Ward*, 409 U.S. at 59. Finally, the complaint that attorney's fees are unavailable under the remission regulations rings hollow, since "exercise of administrative authority affords innocent claimants a means of recovering property without incurring the expense of attorneys' fees." *1991 Annual Report of the Dep't of Justice Asset Forfeiture Program* at 9 [hereinafter *1991 Asset Forfeiture Report*].

5. Respondent (Br. 27) and her amici (see Dade County Br. 3-4, ALTA Br. 19 n.11) suggest that the opportunity to obtain remission or mitigation of forfeiture or repayment of liens on forfeit property is not available to persons who acquire their interest in property after the offense giving rise to forfeiture. That statement does not accord with the pertinent statutes or regulations governing equitable remission, nor it is consistent with Department of Justice practice. The statutory provisions that authorize the Attorney General to grant remission and mitigation of forfeiture (see 21 U.S.C. 881(d); 28 U.S.C. 524(c)(1)(D) and (E)), are not limited to persons owning property before the events giving rise to forfeiture, see Gov't Br. 38, and the Attorney General routinely grants remission, under the pertinent regulations, to persons who would not qualify as statutory "owners." [13] The regulations permit the return of property to a petitioner with a good faith interest "as owner or *otherwise*," 28 C.F.R. 9.5(b)(1) (emphasis added), see Gov't Br. 38 (quoting 21 C.F.R. 1316.79), and contemplate the availability of remission and mitigation for property acquired after the forfeitable offense by requiring that the petitioner establish a lack of knowledge that the property "*was* or would be involved in any violation of the law," 28 C.F.R. 9.5(b)(2) (emphasis added).[14]

[13] The *1991 Asset Forfeiture Report*, *supra*, at 8-9, states a remission policy that is consistent with the practice of entertaining requests for remission regardless of when a property interest was acquired:

> Even after forfeiture of the property, federal law authorizes the Attorney General to "remit" or mitigate the forfeiture if it would be unduly harsh. The Department of Justice routinely grants petitions for remission or mitigation of forfeiture, primarily to innocent lienholder and innocent family members. It is the Department's policy to liberally grant such petitions as a means of avoiding harsh results.

Innocent lienholders on property that was purchased with drug proceeds regularly are granted remission or mitigation of forfeiture to the extent of their interest, see, *e.g.*, *Real Property at 82-550 Avenue 56, Thermal, California*, AFO No. 911415 (Apr. 5, 1991), as are bona fide purchasers of property forfeit to the United States because of the conduct of the prior owner, see, *e.g.*, *One 1988 Mercedes Benz 560 SL*, AFO No. 912483 (Oct. 18, 1991).

[14] Amicus ALTA, see Br. 19 n.11, points to the statement in the U.S. Dep't of Justice, *Expedited Forfeiture Settlement Policy for Mortgage Holders* at 8 (Apr. 1992), that a financial institution seeking expedited settlement must establish that "it [is] an innocent owner" under the applicable statute and case law. However, the phrase "innocent owner" as employed in this policy statement has not been construed as imposing a requirement that the petitioner be an owner in the statutory sense of having acquired the interest in property before the forfeitable offense, since a lienholder or mortgagee would ordinarily not hold title and thus not be an "owner" in any event. Rather, that requirement has been interpreted as incorporating by reference statutory and judicial standards for demonstrating innocence as a prerequisite for eligibility for expedited settlement of a lienholder's interests.

Amicus Dade County reprints an Office of Legal Counsel memorandum explaining that property forfeit to the United States is immune from state and local taxation under current law. The memorandum cites 28 C.F.R. 9.5(b)(1) for the proposition that the Attorney General lacks authority to grant remission of tax liens arising after the offense giving rise to the forfeiture of property to the United States. See Dade County Br. A7. As applied to prop-

6. Respondent (Br. 39-40) and Amicus ALTA (Br. 5-6) complain that, if the Court accepts the logic of the government's position, no one who acquires a financial interest in tainted assets after the acts giving rise to forfeiture—including bona fide purchasers for value—will be entitled to assert an innocent owner defense under the statute. Even if correct, however, that observation is of little consequence for bona fide purchasers, since the government does not ordinarily seize "tainted" assets from persons acquiring them through the ordinary course of business, see Gov't Br. 36 n.13. Moreover, in the case of third-party interests in property seized directly from those suspected of drug activities—such as mortgages, liens, and joint ownership interests—the government will ordinarily honor a request for equitable remission if the property interest was innocently acquired. See note 13, *supra*. To the extent that individuals or institutions are dissatisfied with the relief currently available under the forfeiture statutes and through equitable remission, however, their recourse lies not with this Court—which must apply the language of the statute as written—but with Congress.[15]

* * * * *

---

erty interests generally, however, that regulation has not been construed to bar mitigation or remission of property acquired after the forfeitable offense, and the statute under which the regulation was promulgated certainly does not impose such a restriction. The Attorney General's lack of authority to pay state and local taxes on property forfeit to the United States has nothing to do with the scope of his authority to grant remission; rather, it is grounded in the absence of an "express congressional authorization" to waive tax immunity in the statutory provisions governing remission and mitigation and payment of liens on forfeit property. See 21 U.S.C. 881(d); 28 U.S.C. 524(c)(1)(D) and (E). See also Dade County Br. A5 (citing *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 175 (1989); *Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110, 122 (1954)).

[15] Indeed, in response to the plight of state and local governments, cf. Dade County Br. 1-6, the Senate Judiciary Committee is currently considering an amendment to 28 U.S.C. 524, see S. 2758, 102 Cong., 2d Sess. (1992), that would authorize the "payment of State and local property taxes on forfeited real property that accrued between the date of the violation giving rise to the forfeiture and the date of the forfeiture order."

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

AUGUST 1992

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No. 91-781

In The

Supreme Court of the United States

October Term, 1992

UNITED STATES OF AMERICA,

Petitioner,

v.

A PARCEL OF LAND, BUILDING, APPURTENANCES AND IMPROVEMENTS KNOWN AS 92 BUENA VISTA AVENUE, RUMSON, NEW JERSEY, AND BETH ANN GOODWIN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

SUPPLEMENTAL BRIEF FOR THE RESPONDENT

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ARGUMENT

This Supplemental Brief is respectfully submitted by counsel for Respondent Beth Ann Goodwin in order to cite new authority discovered after our Brief on the merits and to respond to certain factual arguments raised for the first time in the Reply Brief of the United States ("Rep. B.")[1].

[1] A Supplemental Appendix ("SA") is appended hereto to provide material from the record which answers certain of the government's new arguments.

The Meaning of the Term "Proceeds" Is Properly Before the Court, Since The Government's Application of the Relation-Back Doctrine to Proceeds In the Hands of Innocent Owners Necessarily Raises the Issue.

The government asserts that Ms. Goodwin has never before contended that her residence does not qualify as drug proceeds within the meaning of 21 U.S.C. § 881(a)(6). (Rep. B. 2) This issue was raised in both the district court and the Third Circuit. In both courts, Ms. Goodwin contended that the property did not qualify to be forfeited as proceeds, since there was no proof connecting the property or the owner to drug transactions.

At the district court, the question of what constitutes demonstrable proceeds was addressed. After Brenna and Ms. Goodwin separated, she was left without his financial support. Ms. Goodwin took steps to remain financially stable and executed a mortgage on the property and later refinanced the mortgage. The district court began the proceedings by questioning whether the mortgage refinancing in 1988-89 (prior to the seizure in April 1989), which had increased the mortgage to $363,000 and paid off the prior mortgage, thereby generating funds to Ms. Goodwin, created other forfeitable "proceeds." (SA 2-3) The Court was also concerned as to whether the government contended that Ms. Goodwin's furniture constituted proceeds. (SA 3-4) Counsel argued there was no demonstration that the money provided to Ms. Goodwin's lawyer in 1982 from Shaun Murphy was traceable proceeds within the meaning of § 881(a)6 at all. (SA 10-13) Arguing that the facts of this case warrant dismissal of the action, the Respondent's briefs in both courts below specifically raised the claims that the property was owned by an innocent party (not the offender) and the property itself was not guilty of participating in drug offenses. (*See* SA 18-23, a portion of Respondent's initial brief to the Third Circuit.) Similar arguments were presented in briefs to the district court.

The government contends that the definition and scope of the term "proceeds" is not encompassed in the question before this Court. (Rep. B. 2) The government seized and seeks to forfeit this home as "proceeds." That was the premise of the

district court's seizure order and opinion. (P. App. 25a) The government's petition for certiorari and initial brief to this Court is replete with references to the concept of "proceeds." In the petition for certiorari the government referenced the concept of proceeds approximately 30 times in the section designated "Reasons for Granting the Petition." (Pet. for Cert. at 9-24) The second point in the government's "Summary of Argument" in its initial brief asserts that "the relation-back doctrine applies with full force . . . [and] covers 'proceeds' traceable to a drug transaction." (Br. 9) We submit that the extent of the government's right to seize "proceeds" in the hands of innocent owners has always been at issue herein.

We ask this Court to consider the substantial impact on the issues herein created by the expansive interpretation of the term "proceeds" in § 881(a)(6) taken by the United States. Should this court agree with the government that the issues were inadequately raised below, we ask the Court to consider the impact nevertheless. Even when a litigant has waived certain issues, this Court has, on occasion, been willing to consider them when they are significant. *See Kamen v. Kemper Financial Services, Inc.*, 500 U.S. ___, ___, 111 S.Ct. 1711, 1718 (1991); *see also, United States v. Burke*, 504 U.S. ___, ___ 112 S.Ct. 1867, 1877 (1992) (Scalia, J. concurring); *Arcadia, Ohio v. Ohio Power Co.*, 498 U.S. 73, ___, 111 S.Ct. 415, 418 (1990).

"Ordinary" Remission Practices Should Not Alter the Applicable Constitutional Principles, If Properly Raised; However, These Issues Were Not Raised Below and Have No Factual Support in the Record.

The government raises for the first time in its reply brief the contention that it will "ordinarily remit" property to innocent owners. (Rep. B. 4 n.4, 12, 18) Remission was never raised in any form in the district court or the Third Circuit and there is no reference to remission in the opinions below since no remission argument was proffered by the government below.

Respondent and *amici* have pointed out the obvious hardship and inequity that the government would visit upon innocent owners who are unlucky enough to hold title to tainted assets. In response, the government claims, for the first time, that "the government does not *ordinarily* seek forfeiture of tainted assets in the hands of innocent third parties (Rep. B. 4, n.4); that "the government does not *ordinarily* seize 'tainted' assets from persons acquiring them through the ordinary course of business" (Rep. B. 18); and that "the government will *ordinarily* honor a request for equitable remission if the property interest was innocently acquired." (Rep. B. 18) (emphasis added).

Apart from the procedural defect of raising such a response for the first time in this Court and not below, these assertions have no support in the record. The government does not provide any documentary or regulatory basis for these statements. Innocence is not the determinative test under the Remission regulations which require that a petitioner prove no knowledge: (1) that the property was involved in any violation of law; (2) of the particular violation which subjected the property to seizure and forfeiture; and (3) that the user of the property had a record for violating the laws of the United States or any state for a related crime. The regulations also require that a petitioner satisfy the government's interpretation of the standard "that all reasonable steps to prevent illegal use of the property were taken." *See* 28 C.F.R. § 9.5(b) 2-5. Moreover, § 9.5(c) indicates that § 9.5(b) provides the minimum standards for remission and that discretion is still left to deny remission and to substitute "mitigation" which suggests some settlement for an innocent owner who satisfies all of 28 C.F.R. § 9.5(b) (*e.g.*, ½ for the innocent owner and ½ for the Asset Forfeiture Division).

Reported cases reflect only those few forfeiture cases where a party has the financial ability to contest the seizure and/or forfeiture, and some cases suggest that the "ordinary" practices have failed to properly protect innocent third parties. In *United States v. Pole No. 3172, Hopkinton*, 852 F.2d 636 (1st Cir. 1988), the claimants provided money to a relative, Fogarty, who was allegedly involved in drugs. The

claimants, who were Fogarty's relatives, claimed that they should have had an ownership interest in the real property which was purchased by Fogarty. Fogarty had paid part of the monthly mortgage loan payments with alleged drug proceeds. At trial the jury held that the family members had no actual ownership interest in the property and therefore could not assert one against the government in the forfeiture action. The relatives were left to sue Fogarty for the return of their money. The Appellate Court was troubled noting:

> The property was purchased with a downpayment constituting 20.8% of its value. Since that 20.8% interest was acquired two years before the earliest indication of drug activity there is absolutely no reason to believe it is forfeitable.
>
> The government, however, tells us the property is forfeitable in any event because Fogarty has continued making mortgage payments over periods of time for which there are indications of drug dealing. We agree that the interest acquired as a result of mortgage payments made with the proceeds of drug transactions should be forfeitable. We do not believe, however, that forfeitability spreads like a disease from one infected mortgage payment to the entire interest in the property acquired prior to the payment. After all, only the actual proceeds of drug transactions are forfeitable.

Id. at 639-640. The briefs filed by the various amici strongly suggest that the "ordinary" remission practices are not as prevalent in the various Asset Forfeiture Sections throughout the country as government counsel believes.[2]

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[2] *See United States v. Real Estate located at 116 Villa Rella Dr.*, 675 F. Supp. 645 (S.D. Fla. 1987), where the alleged drug dealers purchased property and transferred it to the Petries. The Petries claimed a debt still due to the drug dealers. 675 F. Supp. at 646. The Petries sold the allegedly tainted property and thereafter bought another property. 675 F. Supp. at 645. The government sought to seize this second property as proceeds. The Petries unsuccessfully moved to enter a counterclaim and enter pleadings and to limit the government's interest to the value of the original cash proceeds owned by the drug dealers. The Petries moved to bring the drug dealers into the case to resolve their debt to the drug dealers within the

Many states have now enacted statutes modeled after the various federal forfeiture statutes and covering "proceeds." *E.g.* N.J.S.A. § 2C:64-1(4).[3] Some states may not adopt any remission policy, much less the "ordinary" remission practices set forth in the solicitor's brief. The pronouncements of this Court on due process as applied to the seizure practices will have an impact beyond the federal government's policies.

If, as a result of the assertions of ordinary remission practices, this Court does not consider the application of the constitutional principles to this case, there will be no protection for innocent owners whose cases are not deemed "ordinary" by the DEA agents responsible for assembling and presenting the pertinent facts to the remission offices as set forth in 28 C.F.R. § 9.4.

The government also contends that the constitutional arguments in Respondent's brief are not properly before the Court. (Rep. B. 1-2) The central issue before the Court is the statutory construction of § 881(a)(6). It is a fundamental tenet of statutory construction that, where reasonable, a legislative provision should be given an interpretation that is consistent with the Constitution. The government seeks to reinstate the district court decision where the home of an innocent owner was seized and deemed forfeit based on a conclusory allegation that it was purchased with downstream proceeds of an unlawful drug transaction and without any evidentiary hearing whatsoever.[4] (Pet. App. 42a n.3) The government's position

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confines of the same case. The Court granted the motions of the government to hold that the downstream proceeds could be seized and dismissed the owner's claims.

[3] We ask this Court to take judicial notice of similar problems for innocent owners that now arise under state forfeiture practice. *See, e.g.*, Sunday *New York Times*, September 13, 1992, "Protests Mount Over Police Confiscations." (SA24-25)

[4] The government fails to meaningfully address the forfeiture cases involving the criminal offenses of treason and the constitutional prohibitions preventing the infliction of such forfeitures upon the innocent families of such offenders. (Rep. B. 2 n.1) Those cases and constitutional principles analyzed in our brief at 19-21 are as relevant to construing the application of the due process clause to § 881(a)(6) as are the government's citations to piracy, tax and customs forfeiture cases. (*E.g.*, Rep. B. 15-17)

is that Congress intended to disenfranchise innocent owners when it approved the "relation back" clause and that innocent owners are to be treated with less protection than those alleged to be involved in the criminal offenses, where properties are forfeited only after a determination made beyond a reasonable doubt. We submit that § 881(a)(6) cannot be construed without considering the constitutional implications of the government's position.[5]

We submit that this Court should protect innocent owners at the outset by requiring the government to demonstrate that the *property* and/or its owners have some substantial involvement in the prohibited transactions when the forfeiture action is initiated. The government should be required to allege and demonstrate by probable cause that the owner is not an innocent owner.[6] There should be no seizure in the first instance if such a demonstration cannot be made and is not pled in the complaint. Otherwise, innocent owners are put through prohibitive costs to recover their cars (vehicles which may be necessary for transportation to jobs) or even their homes. An individual faced with litigating against an adversary with virtually limitless resources will often simply default and abandon the property regardless of the merits of his or her position. The requirements that guilty knowledge be pled and proved at the outset would accord with due process

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[5] This should be contrasted with the procedure in *United States v. All Funds On Deposit at Merrill, Lynch, Pierce, Fenner & Smith*, ___ F. Supp. ___, 1992 WL 187755 (E.D.N.Y. August 5, 1992) at p. 4, where three days of evidentiary hearings occurred at the outset on the issue of probable cause to seize.

[6] The pleadings in this case contrast with *United States v. Esposito*, ___ F.2d ___, 1992 WL 183200 (2d Cir. August 3, 1992) where the Second Circuit reversed a district court order obtained by the government which required an interlocutory sale of a home prior to a trial and a judgment of forfeiture. The government "alleged that the Princess property was constructed in 1985 with the proceeds of narcotics transactions and was later used to store narcotics for distribution. The forfeiture complaint also alleged that these events occurred with the knowledge of Klare Esposito; she asserts that she was innocent of any wrongdoing." *Id.* at p. 5. Ms. Esposito was the joint owner of the seized home. Those pleadings contrast with the pleadings filed herein, where there was no allegation that Ms. Goodwin was not an innocent owner at the date of the transfer and purchase in 1982.

and would effectuate the interest of Congress with respect to innocent owners.

Recently Decided Cases Provide Support for the Construction Proffered by the Respondent.

The government's case rests on the premise that the "relation-back" clause (18 U.S.C. § 881(h)) limits the scope of the "innocent owner" defense (18 U.S.C. § 881(a)(6)). A decision of the First Circuit filed after our merits brief reveals that the "relation-back" clause addresses other issues instead.

In *United States v. Bucuvalas*, ___ F.2d ___, 1992 WL 168339 (1st Cir. July 22, 1992), the defendant had sold certain real property which was subject to forfeiture pursuant to 18 U.S.C. § 1963(a)(2). After the jury returned a verdict of forfeiture, the proceeds of that sale, as well as the accrued interest, were forfeited to the United States. The First Circuit held that under the "relation-back" clause (18 U.S.C. § 1963(c)), title in the property vested in the United States upon the commission of the act giving rise to forfeiture. Thus, the interest belongs to the entity entitled to the forfeited principal. The "relation-back" clause (21 U.S.C. § 881(h)) does not determine *whether* a given property is forfeited, but rather impacts only upon *how much* of the property is forfeited after the forfeiture judgment is obtained. Thus, if indeed the property is forfeited from Ms. Goodwin, then the passive increase in value may accrue to the government. If the property is not forfeited because she is an innocent owner, the relation-back clause would not extinguish her claim.

The government claims we failed to address the "common law" background of the relation-back doctrine which they assert vests title as of the time of the act giving rise to forfeiture that is the date of the crime. (Rep. B. at 11)[7] Since the government seeks to seize downstream proceeds, which were totally uninvolved at the date of the crime, the doctrine is inapplicable to such actions. Also, this Court has made

[7] The government did not take notice of our brief at pp. 32-34.

clear from its earliest pronouncements that the rules of common law are inapplicable to statutory forfeitures. *United States v. Grundy and Thornburgh*, 7 U.S. (3 Cranch) 337, 350-51 (1806).

Section 881 provides the government with an option to seize either the drugs, the money derived from the drugs or various proceeds traceable thereto. (*See* Rep. B. 3) Section 881 is not self-executing but rather states that certain property shall be "subject to" forfeiture. When the government filed the Complaint, it elected at that point to attempt to seize Ms. Goodwin's house as downstream "proceeds" traceable to derivative proceeds of a drug transaction. In *Caldwell v. United States*, 49 U.S. (8 How.) 360 (1850), this Court held that when the statute permits forfeiture of goods or the value thereof, forfeiture is deemed as of the date of the filing of the Complaint.[8] *Accord National Atlas Elevator Co. v. United States*, 97 F.2d 940, 942-945 (8th Cir. 1938); *See Motlow v. Missouri*, 295 U.S. 97 (1934). The government is now pursuing the proceeds in the hands of the drug dealer Brenna, as well. (JA 34-37) The conflicting elections, as the government seemed to recognize, create impediments for this case. (Rep. B. 36 n.13)

Recent cases reflect the judgment of other courts that the relation-back doctrine is not intended to extinguish the rights of innocent owners of proceeds. *United States v. Esposito, supra*, pp. 3-4. In *United States v. All Funds on Deposit at Merrill Lynch Pierce Fenner & Smith, supra*, the jury determined that one of the 22 claimants who participated in the joint trial and whose assets were seized had met its burden of proving that "it did not know . . . that the funds in question constituted the traceable proceeds of illegal drug activity and drug money-laundering transactions." The claimant needed to establish at trial only that it was unaware of the connection of the proceeds to the illegal acts. *Id.* at pp. 5 and 8.

[8] The relation-back clause was enacted two years after the transfer to Ms. Goodwin; therefore, even if that clause was held applicable to the innocent owner defense, it should not affect Ms. Goodwin's title which vested two years earlier.

In *United States v. Delco Wire and Cable Co.*, 1992 WL 151762 (E.D.Pa. June 23, 1992), the government sought to invalidate a creditor's security interest created in 1987 on the theory that Delco's income since 1973 was the product of racketeering activity. The Court held that the government's forfeiture theory that cut off the interests of innocent owners with after-acquired rights was too broad, stating:

> if the government's position were correct, the government could seek the return of the salary of any innocent employee of Delco or any other business found guilty of violations. If the employee paid for groceries and rent from those tainted funds, the government could seek forfeiture of those funds from the employee's grocer and landlord.

Id. at p. 5.

CONCLUSION

It is now ten years after the home was purchased. The government suggests that this case should return to the district court for further proceedings. (*See* Rep. B. 12 n.9) The government has virtually unlimited legal resources; private clients do not. We ask this court to terminate this action. The Third Circuit remanded this case *solely* for reconsideration of whether Ms. Goodwin's summary judgment and dismissal motions should have been granted. We ask this Court to modify the Circuit's order and dismiss the case since there was no demonstration in the context of the summary judgment motion that Ms. Goodwin was not an innocent owner. Moreover, the Complaint did not allege that Ms. Goodwin, the sole homeowner was not innocent; therefore, the Complaint was defective from the outset.

Respectfully submitted,

JAMES A. PLAISTED

[p. 1] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CIVIL NO. 89-411

UNITED STATES OF AMERICA,	:	
-vs-	:	
A PARCEL OF LAND, BUILDINGS, APPURTENANCES, and IMPROVEMENTS, known as 92 Buena Vista Ave., Rumson, New Jersey,	:	TRANSCRIPT OF PROCEEDINGS
Defendant.	:	Motion

Newark, New Jersey
May 29, 1990

BEFORE:

THE HONORABLE HAROLD A. ACKERMAN, U.S.D.J.

APPEARANCES:

SAMUEL A. ALITO, JR., UNITED STATES ATTORNEY
BY: NEIL R. GALLAGHER, ASSISTANT U.S. ATTORNEY
For the Plaintiff

WALDER, SONDAK, BERKELEY & BROGAN
BY: JAMES A. PLAISTED, ESQ.,
For the Defendant

Pursuant to section 753 Title 28 United States Code the following transcript is certified to be an accurate record

as taken stenographically in the above entitled proceedings.

Thomas F. Brasaitis, C. S. R. Official Court Reporter

[p. 2] THE COURT: May I have the appearances, please.

MR. GALLAGHER: Neil Gallagher, Assistant U.S. Attorney, appearing for the plaintiff.

MR. PLAISTED: Jim Plaisted appearing for the claimant Beth Ann Goodwin, your Honor.

THE COURT: I've read all the papers in this case, and there were many, including depositions, et cetera. And I'm prepared to decide this very interesting case this morning.

I want to ask one question after – before inviting counsel to say anything they want to say if there's anything they haven't said that should be said. I noticed – there are two things I noticed: That in the winter of 1989, Mr. Plaisted, your client secured a mortgage for $363,000 from a bank on the premises at 92 Buena Vista Road in Rumson, New Jersey; is that correct?

MR. PLAISTED: I believe so, your Honor. Whatever the papers show I believe is accurate.

MR. GALLAGHER: Your Honor is correct, that is as revealed by the title search.

THE COURT: What's the status of the government's position with respect to that money?

MR. GALLAGHER: Quite frankly, your Honor, that's something that I'm going to be taking up with my division chief to see what the government is going to do.

One of my impressions is that that money is proceeds [p. 3] just as the house is proceeds and is subject to seizure. Quite frankly, the two mortgages that have been taken out in the past two years total, I think, about $500,000.

THE COURT: I didn't know about a second mortgage. What's the second mortgage? This is news to me.

MR. GALLAGHER: There was a mortgage taken out I believe it was in June, 1988, about eight months prior to this mortgage.

THE COURT: I missed that, I must tell you, Mr. Gallagher.

MR. PLAISTED: It's in Mr. Gallagher's last affidavit.

THE COURT: What are the total amount of mortgages?

MR. GALLAGHER: $500,000, approximately, your Honor.

THE COURT: Now, next question I have to ask is: I noticed amongst your submissions, your latest submission, an advertisement in a newspaper, and I believe it was September of what, '89?

MR. GALLAGHER: September 9, 1989, your Honor.

THE COURT: In which Mr. Plaisted's client, I presume, had a rather extensive ad listing a lot of very valuable objects of art as well as antique furniture for sale. Does the government make any claim with respect to those items? I don't know what you realized from the sale. It's not clear.

MR. GALLAGHER: At this time, your Honor, I don't believe I have a claim. I will not be asserting a claim based [p. 4] on what I know now.

THE COURT: Now, thirdly – there were three points, I said two – the last paragraph of I think it's your affidavit of certification says, it's your understanding that property is – has been listed for an alleged value – for asking price of $850,000.

MR. GALLAGHER: That's correct, your Honor.

THE COURT: What's the status of that?

MR. GALLAGHER: I believe that the sale is pending.

MR. PLAISTED: Listing is pending with the realtor waiting for buyers.

THE COURT: There's no buyer at this point?

MR. PLAISTED: No.

THE COURT: All right. I was just curious in that regard.

Now, since it's your motion, Mr. Plaisted, is there anything you want to add to the papers? And may I say that each side was extremely helpful in its – in their respective submissions.

MR. PLAISTED: Yes, your Honor, there is, and I would ask the Court's indulgence. I think I can do my remarks, absent questions, although I welcome questions and would prefer them, within 15 minutes, but I really would like the opportunity to address the Court.

THE COURT: Well, I gave you the opportunity.

[p. 5] MR. PLAISTED: I know, your Honor.

THE COURT: Speak.

MR. PLAISTED: You're always very patient.

THE COURT: Speak.

MR. PLAISTED: Your Honor, I represent Beth Ann Goodwin. That is her married name. She was married in – a long time ago. Her oldest child is almost 20. She was separated thereafter. She did not formally get divorced from her first husband whose name was Goodwin.

Late in the 1970s she established a relationship with a Joseph Brenna. They did not formally get married but it was a very close relationship as the documents and depositions revealed.

THE COURT: Says they had an intimate relationship.

MR. PLAISTED: No question.

THE COURT: That's what the papers say.

MR. PLAISTED: As is not uncommon in such situations, there were gifts from him to her. They lived together during certain periods of time. One of the gifts

was $240,000 that was wired to her attorney in New Jersey.

THE COURT: Is that one from Shaun Murphy?

MR. PLAISTED: From a person who was handling investments for lots of people including Mr. Brenna, a Shaun Murphy.

THE COURT: Is he down in St. Thomas?

[p. 6] MR. PLAISTED: No, he's in the British Virgin Islands on Tortola.

THE COURT: I couldn't figure out if he was in the B.V.I. or Tortola or St. Thomas. He got around.

MR. PLAISTED: On Tortola.

THE COURT: On behalf of a lot of clients?

MR. PLAISTED: He had a great number of clients.

THE COURT: So he wired the money up to the Mason firm?

MR. PLAISTED: He wired the money up to specifically Mr. Davis in – I guess that's the firm.

MR. GALLAGHER: Yes, your Honor, Mason, Griffin and Pierson.

MR. PLAISTED: Her lawyer was Mr. Davis at the firm, and he was the one who handled the later use of that money to later buy a house she selected through our own realtor. She bought and he consummated the purchase in '82, and she lived in from '82 up through the present time except for a brief hiatus. Her children had

lived there with her. Mr. Brenna did live there from time to time during the period that she had a relationship with Mr. Brenna.

Her verified petition that has been filed as an exhibit in this case details when her relationship with Mr. Brenna ended. It was, I think, in either 1987, '86, somewhere in there. It's in the documents. It ended because, in part, there was some abuse as is – can happen in personal relationships [p. 7] between individuals.

THE COURT: Sometimes true love does not run smoothly.

MR. PLAISTED: Exactly so.

And sometimes in such circumstances it is not unusual for a woman in her position not to be fully familiar with his business dealings, so to speak, or his financial transactions. That isn't uncommon. I'm sure that is something that everybody, just through life experience, comes to recognize.

She lived up in New Jersey; she lived in her house; she maintained it; she improved it; she made decisions on it; and she is there to this day. In approximately April of '89, about seven years after the purchase, the house was seized.

There are two prongs to the complaint, and I would like to address both: The first is that specifically the proceeds are traceable to a drug transaction; and the second is that there was an isolated instance in 1986 when Mr. Brenna came to the property, met with somebody –

THE COURT: Was that for allegedly a $30,000 deal?

MR. PLAISTED: – and gave them 30,000 in cash, not for a drug sale with drugs on the property. The government has said there was a transfer that somehow related facilitating some other transaction in some other spot. So there was, as the government alleges it, a transfer of $30,000 in 1986.

Now, your Honor, I'm not here over the procedural defects, and I would say the Second Circuit decision is [p. 8] appropriate, but I am here over the merits. We made a number of motions on the merits as to the dismissal and entry of an order in our favor.

Now, I would like to approach the summary judgment first because it affects all of the other ones, and if you take the two prongs of what the government alleges, I'd like to address the first one first and point to the specific facts that relate to those two pieces.

The first is the money is traceable to a drug transaction back in 1982. Now, we deposed the case agent as much as the government would let us. What became clear from that deposition was that there was this transfer of money, that your Honor is obviously familiar with so I won't go through it, from Tortola.

Mr. Murphy was deposed and the case agent was deposed. Mr. Murphy said, I have no idea where this money came from and I have no information that suggests that this was from a drug transfer. The case agent, when asked about it, said the sum total of his knowledge relating to this being a drug transaction comes from a person named Mr. Mazacco that the government then –

THE COURT: Mr. Mazacco –

MR. PLAISTED: Mr. –

THE COURT: – who was an alleged informant?

MR. PLAISTED: He's an alleged witness, I don't know [p. 9] about informant. He is a person the government says they are going to produce in this case.

THE COURT: He's been indicted –

MR. PLAISTED: No.

THE COURT: Let me finish.

Mr. Brenna had pled guilty several years ago to a CTR, correct –

MR. PLAISTED: Something like that, yes.

THE COURT: – down in the Southern District of Florida.

And in April it is my understanding that he was – he has been indicted on drug charges in Florida in the United States District Court in which it is alleged that this – these premises were purchased with drug money.

MR. PLAISTED: What the government says in that indictment, they want to forfeit his interest in these premises.

THE COURT: But the reason they want to is because they say what they're saying here today; is that correct?

MR. PLAISTED: I have no idea. Your Honor, I know the indictment is filed. It doesn't go into evidence. They are saying they want to forfeit it.

THE COURT: But am I overstating it?

MR. PLAISTED: I assume that's their theory, Judge, but I don't know. I just don't know.

What I do know is what we have in the record here as to [p. 10] whether the money is traceable. As – they have a right to forfeit this on two grounds. One is traceable. If it's traceable, they can forfeit it.

We have two witnesses that are identified and deposed Mr. Murphy. Didn't depose Mr. Mazacco, but Mr. Jack Giacobbe, the agent, gave evidence as to what the basis is for saying it's traceable.

What he said, Judge, is that, at T-70 to 75, he talked about the drug transaction that he says may be related to this money. What he said specifically I ask your Honor to look at those precise pages.

Then there's another set of precise pages. He said, well, I understand there may have been a drug transaction in 1981 to '82. I don't know when. I don't know where. It was maybe in the northeastern United States. It was maybe in the southeastern United States. And I think it came from South America.

And it alleges, I guess, marijuana in the indictment.

THE COURT: From Columbia, isn't it alleged?

MR. PLAISTED: I don't know what the indictment says. I know that he said, I think it's from South America.

THE COURT: Well, Columbia is in South America.

MR. PLAISTED: Well, in his deposition I do know –

THE COURT: Didn't he say – we can take judicial notice Columbia is in South America.

[p. 11] MR. PLAISTED: No. You know what he said, how do you know it comes from South America?

Well, drugs come from South America.

Yes –

THE COURT: Some drugs do.

MR. PLAISTED: But in terms of evidence, he didn't have any.

Now, in terms of – we then got specifically to the question of traceable. And I ask your Honor to look at what he said, because it's his affidavit that covers the complaint in this case, at – from 139 to 147 of his deposition. And he was asked if he got documents that showed that Mazacco has any knowledge about Brenna's finances back then?

No, he doesn't have any knowledge.

Do you have any information about Mr. Brenna's finances?

No, I don't have any.

Do you know how much he got from this drug transaction?

No, I don't know if he got anything. I don't know what he got.

So, your Honor, all I am pointing out to you is that the person whose affidavit supports the complaint on the basis of the theory that this is traceable has no information that shows it's traceable. He says that Mazacco has none and Murphy said he has none and that leaves nobody else.

[p. 12] And so I ask that that portion of the complaint be ruled out on the grounds that there isn't any dispute of fact and they haven't put in anything and there just isn't any. I don't think they can, and that is why I would submit they haven't. But, in any case, as the pleadings stand now, there isn't any. And we examined the case agent on that precise situation and those were his answers.

On the issue – their other prong to this complaint is that there was a transaction in 1986, that your Honor alluded to, where Brenna comes from somewhere, he comes to the property – he is there from time to time because of this personal relationship – he meets and he supposedly gets $30,000, presumably. I – gives, presumably, I guess, to Mazacco, he gives $30,000 to somebody. That is a fee, the government says, ties into a drug transaction.

They don't say there's a drug sale there, they don't claim there is, and there's no evidence there was. That evidence and the allegations there – and we examined him again on whether Mrs. Goodwin, who owns the house and lives there and has always lived there, was she present during that.

He said he didn't have any information showing that she was a participant. He didn't have any information on that.

Did she know about it?

He didn't have any information on that other than the fact they had a personal relationship.

[p. 13] This agent thinks that because this woman had a personal relationship with Brenna, she is tabbed with whatever his illegal acts are.

I don't think the law says that. I think they have to have some evidence, and I would cite your Honor to a specific case on this other aspect of the – the case I would cite is a Supreme Court case. It's at 401 U.S. 715. It's United States versus Coin and Currency. It's a seizure type case. Relates to IRS seizures. But our Supreme Court in it indicated two things: They indicated – and there are other lower level decisions. I have a F.Supp. I think we cited in our briefs that say, look, if you're going to seize property, there has to be a significant connection of the owner's illegal acts to the property.

* * *

[p. 19] THE COURT: I mean, I could go on and on. But is it a fair supposition that with respect to Murphy he strongly smelled that Mr. Brenna was not a legitimate businessman asking him to do legitimate things? Is that a fair inference –

MR. PLAISTED: Well –

THE COURT: – to draw from Murphy's testimony?

MR. PLAISTED: That he had questionable financial and other dealings? I think it's fair to suggest that when they're transferring cash.

The man – the government's witness, Mr. Murphy, out and out said, he had – quote at P-21, Line 11 – no facts to show that Brenna ever gained any money from drug transactions. That's their witness.

Now, if your Honor is saying, gees, these transactions look odd, I would agree.

THE COURT: I didn't say they looked odd, I'm saying that from Murphy's standpoint, they looked odd enough to him so he didn't want to touch it with a ten foot pole except to take the guy's money.

MR. PLAISTED: Murphy had 600 clients that he dealt with in the same way.

THE COURT: A lot of business down there, he told us, which invites the interest, apparently, of the United States [p. 20] government and Scotland Yard, I believe, in reading the deposition carefully.

MR. PLAISTED: Your Honor, I –

THE COURT: Lot of business down there.

MR. PLAISTED: Fortunately, I don't have to defend Brenna, and don't want to because that isn't my case. It doesn't – I could concede here, for the purpose of argument, that Brenna was a drug dealer and I wouldn't be in any worse shape, but I don't have to.

THE COURT: You would not?

MR. PLAISTED: I don't think so.

THE COURT: Mr. Plaisted –

MR. PLAISTED: I don't think so.

THE COURT: – step back a moment, think about that last statement.

MR. PLAISTED: All right.

THE COURT: If I would concede he was a drug dealer, –

MR. PLAISTED: I don't, but if I did –

THE COURT: – you wouldn't be in any worse shape?

MR. PLAISTED: I don't think so, because, your Honor, think about it for a minute. The government – this is a tough statute. There are specific requirements put on the government in order to enforce this statute against somebody like Mrs. Goodwin. They have to show that the money is traceable to a drug transaction. Just because they allege, and even if they [p. 21] convict him that he was at one time a drug dealer, doesn't mean that this is traceable and they can take her house that was purchased eight years earlier, perhaps before he even started being engaged in any drug transactions.

For example, if he had a boat business, as the government's witness suggests that he did, where he's buying and selling boats, if the money comes from another legitimate transaction, the fact that he happened to dabble in marijuana doesn't mean they can go seize this woman's house.

THE COURT: Okay.

MR. PLAISTED: And, so, no, I don't think the – the fact that he is indicted doesn't have any impact here. She isn't – they concede she isn't. That's our issue, not him. I don't have to defend him. I don't want to defend him, fortunately.

So I think I'm entitled to the judgment because she isn't involved, because the property isn't involved, and they haven't produced any evidence to show it is and we have produced a lot to show it isn't; namely, her affidavits.

In terms of the – I would just point out to your Honor that the original complaint, if one looks at it, before you have a seizure in the first instance, if you go through a trial, et cetera, you have to show probable cause.

This agent has now been deposed. What is crystal clear is that, for the critical parts of his affidavit, he didn't have [p. 22] facts to support them. For example, was the money traceable? He doesn't have any, and he said so.

His complaint that he swore to said otherwise. Does he – anyway, I just point that out because if we get to the first step, I think I'm in on the other ground.

But let's say –

THE COURT: What about the government's request for a stay here?

MR. PLAISTED: All right.

Now, as to –

THE COURT: Can I shift you into that gear?

MR. PLAISTED: Sure.

As to the stay, I would ask your Honor – there's a Tenth Circuit case that talks about – 801 F.2d 1210 case, United States versus Canadian Currency. It's the case I rely on to say look at this complaint, it's totally inaccurate [sic inadequate] under the standards of that case. You should dismiss it for that reason as well.

But as to the stay, it is interesting, I think. It has an impact in that regard. In that case they talk about the protections to a criminal defendant who is having his property seized. And what they point out is that when Brenna has his property seized, or any other criminal defendant, they have a right to hearings as to whether there's a likelihood of a success, they have a right to have it in short order and then [p. 23] they have a criminal trial coming up. And all of those things happen rapidly.

And I would just point out that in this case, first, I don't think the stay provisions that are cited apply because she hasn't been charged at all. Second, if she was, she would have had greater protection than the government is saying now, as I understand it from my last conversation with – I called – the U.S. Attorney in charge of the criminal case called me, and –

THE COURT: Where? You mean in Florida?

MR. PLAISTED: Yes. And with the lawyer who has defended Mr. Brenna in the past.

The last I heard, Brenna has not been arrested and is a fugitive. And so –

* * *

Portion of Initial Brief for Respondent Submitted to the Third Circuit

* * *

POINT II

THE FINDINGS AS A MATTER OF LAW THAT THE CLAIMANT IS NOT AN INNOCENT OWNER ENTITLED TO KEEP HER HOUSE SHOULD BE VACATED AND REVERSED.

The trial court ruled after a review of depositions and affidavits that this claimant could not qualify as an "innocent owner". The Court held: (1) that probable cause was established that this party was purchased with money traceable to drug proceeds; and (2) that the claimant could not qualify as an innocent owner since the transfer of funds to her was not for value. However, the district court made no finding that the government established probable cause demonstrating that the claimant was substantially involved in the illegal activity or that the property itself was substantially involved in the illegal activity. We submit it was required to do both before shifting the burden of proof. There was no basis to find that the claimant was anything other than innocent in this regard since there were no allegations or proofs that she was involved in illegal drug activity.

A. Since The Government Failed To Prove That The Claimant Was Involved In Drug Transactions The Complaint Should Be Dismissed.

The forfeiture of a citizen's home when there is no allegation that the citizen significantly participated in a criminal enterprise should be prohibited. In *United States*

v. United States Coin and Currency, 401 U.S. 715 (1971), the Supreme Court construed similar IRS forfeiture statutes:

> [A]lthough it is true that the [forfeiture] statute does not specifically state that property shall be seized *only* if its owners significantly participated in the criminal enterprise, we would not readily infer Congress intended a different meaning. (emphasis added).

401 U.S. at 719. *See also, Suhomlin v. United States*, 345 F. Supp. 650, 654 (D.Md. 1972).

The government sought to satisfy this element in the forfeiture complaint by the conclusory allegation that the claimant was not the true owner of the property but rather a nominee for Brenna. The district court did not rely on this conclusory allegation or make a finding that there was probable cause to believe it for good reason. *Giacobbe* stated that no one ever told him the claimant was an nominee (e.g., A384; 414). Giacobbe's only basis for alleging that the claimant was a nominee was her immunized statement where she answered questions as to the marital type relationship she maintained with Brenna (A421-22 and 455 *et seq.*). Since there was no evidence she was a nominee for Brenna and since there is no allegation that she was involved in the drug activity the complaint should have been dismissed.

B. Since The Government Failed To Prove That The Property Was Substantially Involved In Drug Transactions, The Complaint Should Have Been Dismissed.

As a precondition to forfeiture the government should be required to prove that the homeowner participated in the illegal activity and that the property has a substantial connection to the illegal activity. Other circuits ruling on this issue have mandated that the government provide evidence of "a substantial connection between the property to be forfeited and the underlying criminal activity" prior to sanctioning forfeiture. *See United States v. Property in Greene and Tuscaloosa Counties,* 893 F.2d 1245, 1249 (11th Cir. 1990); *United States v. Santoro,* 866 F.2d. 1538, 1542 (4th Cir. 1989); *United States v. One 1986 Nissan,* 895, F.2d, 1063 (5th Cir. 1990); *United States v. Padilla* 888, F.2d. 642 at 643 (9th Cir. 1989). The district court did not specifically find that there was a substantial connection between the real property and any drug activity.[2] Instead the court presumed that since the

[2] There is a second aspect to the Complaint which was specifically not relied upon by the district court in holding that probable cause existed to forfeit the property. The allegation is that a $30,000 payment was made on the premises of the property in December 1986 to a crew member of a smuggling venture. There is no claim or evidence that drugs were on the property. Brenna had no prior criminal drug record (A372). No drug paraphernalia was ever found on the property. There is no claim that the claimant viewed or personally participated in this alleged transfer. (A389-92) There is no identification of any drug transaction to which the $30,000 is allegedly related nor has the method of payment i.e., transfer of checks, securities or cash ever been identified. That is an inadequate connection of the

government had established by "probable cause" that the $216,000 wired to claimant's attorney was allegedly traceable to drugs the property should be forfeited. (A22) In essence, the Court held that the purchase alone with such funds satisfied the substantial connection requirement.

This case differs substantially from other cases where the government has sought to seize cash or real property inasmuch as the government customarily establishes that the owner was involved in drug activity as was the property. Other cases such as those cited by the district court at A231 where (1) the money is involved in a identifiable drug sales (2) drugs or drug paraphernalia is found on the scene or (3) where the Columbian nationality of couriers of cash involving numerous cash transactions may warrant an inference that the money is derived from drug transactions. In this case there were no "Columbian couriers". There were no drugs or drug paraphernalia found at the home. There were only two transfers on money in an area of the Caribbean known to attract funds for tax avoidance reasons. In fact, the volume of Murphy's business suggests that he was shielding assets for tax purposes as well as performing investment functions for numerous American and foreign nations [als. in *Greene,* supra]. The court refused to allow a forfeiture action based on conclusory allegations, in the Complaint, that [P]ate, a convicted drug trafficker, had

property to a drug transaction to warrant forfeiture and the district court did not identify this allegation as a basis for its ruling, presumably for these reasons. Additionally, the only evidence as to this transfer is the hearsay from the informant Mazacco, whom the government would not produce.

provided the funds in cash for the purchase of the seized bulldozer in the name of others. [P]ate's prior drug activity and alleged practice of providing cash for such purchasers were deemed to be insufficient. *See United States v. One 1976 Ford Pickup*, 769 F.2d 525 (8th Cir. 1985) (where the pleadings merely alleged that the property was purchased with cash and placed in the name of a person other than the cash bearer, such pleadings standing alone were inadequate to sustain a forfeiture); *See United States v. $38,000 in United States Currency*, 816 F.2d 1538 (11th Cir. 1987).

Courts have not allowed forfeitures where autos have been used in connection with illegal activities but drugs have not been present in the vehicle. *See e.g., United States v. One 1972 Datsun Vehicle*, 378 F. Supp. 1200, 1203 (D.N.H. 1974). *See also, United States v. Plymouth Coupe*, 182 F.2d 180 (3d Cir. 1950) (where vehicle used only to transport the owner to the site of the illegal operation was not held to be subject to seizure); *See also Simpson v. United States*, 272 F.2d 229 (9th Cir. 1959); *United States v. Lane Motor Company*, 344 U.S. 630 (1953); *Platt v. United States*, 163 F.2d 165 (10th Cir. 1947). Since the government has not shown by probable cause that the property was used in the drug trade the action should be dismissed. Forfeitures are not favored and should only be enforced when they are within the spirit and the letter of the law. *United States v. One 1936 Model Ford Coach*, 307 U.S. 219, 226 (1939). Since the government did not make a showing that the owner was involved in the drug transaction nor that the property was adequately involved the Complaint should be dismissed.

C. Even if The Government Satisfied Its Burden of Proving That All The Elements of Its Case Were Satisfied, The Innocent Owner Disqualification Should be Vacated.

The district court also held that claimant's innocent owner claim was deficient as a matter of law since the $216,000 which she used to purchase the property was not given to her for fair value. We submit that whether a gift of funds to a marital type partner or a spouse is for fair value is a question for the fact-finder, i.e., the jury, and is not determinable as a matter of law.

NEW JERSEY WEEKLY

The New York Times

SUNDAY, SEPTEMBER 13, 1992

Section 13

Protests Mount Over Police Confiscations

By JAY ROMANO

LAWYERS, legislators and civil liberties groups are demanding major changes in a state law that gives the police broad powers to confiscate money, personal property and real estate from people charged with crimes.

Law-enforcement officials say that the law, known as the forfeiture statute, is a potent weapon in the fight against crime, particularly drug trafficking, because it deprives criminals of the tools of their trade, particularly their cars. The sale of confiscated property has also yielded $83 million since the passage of the statute in 1986, a boon for increasingly tight police budgets.

But critics say the law has led to violations of constitutional rights, to penalties that are greatly disproportionate to the crime and to the extraction of guilty pleas from defendants who might otherwise plead not guilty.

"I don't think there's one criminal defense attorney in the state who isn't outraged at this forfeiture law," said William J. DeMarco of Wayne, a criminal-law specialist. "The state should not be able to take things and then say, 'We've got them; now you've got to fight to get them back.' "

Two measures have been introduced in the Legislature that would have the effect of changing the law, and the American Civil Liberties Union is preparing to challenge the statute in the courts. Robert T. Winter, director of the Division of Criminal Justice in the State Attorney General's office, said new regulations governing enforcement of the law would be proposed by his office this month.

Under the statute, the police can confiscate any property that they have reason to believe has been used in the commission of a crime or the proceeds of a criminal activity. That property has included businesses, bank accounts, cash, houses, furniture, boats and even vacant land.

In Sussex County, for example, the police confiscated an entire house that they said had been used to store items stolen from residents of the area. The house was ultimately returned to the owners after they pleaded guilty to the charges and paid a fine. In Monmouth County, officials seized office furniture, desks, stationery, telephones, a copy machine and other furnishings from a home in which a man was charged with practicing psychiatry without a license.

The police are allowed to confiscate property immediately, Mr. Winter said, to prevent it from being disposed of while the criminal case is pending. If officials intend to keep the property, they must file a civil lawsuit within 90 days of confiscation. That lawsuit is then heard by a judge sitting without a jury, who decides whether the property was used in a criminal enterprise.

In most cases, the confiscated property is sold at auction, although officials sometimes use confiscated cars in undercover work. The money generated by the sales is then used by the agency that made the arrest, though it cannot be used for salaries.

Christopher Florenz, a spokesman for the Attorney General's office, said forfeitures had generated about $17 million for the state and about $66 million for the state's 21 county prosecutors' offices.

Law-enforcement officials hail the law. "It provides additional punishment for those who break the law, and it prevents them from maintaining the fruits of their criminal activity," said the Somerset County Prose-

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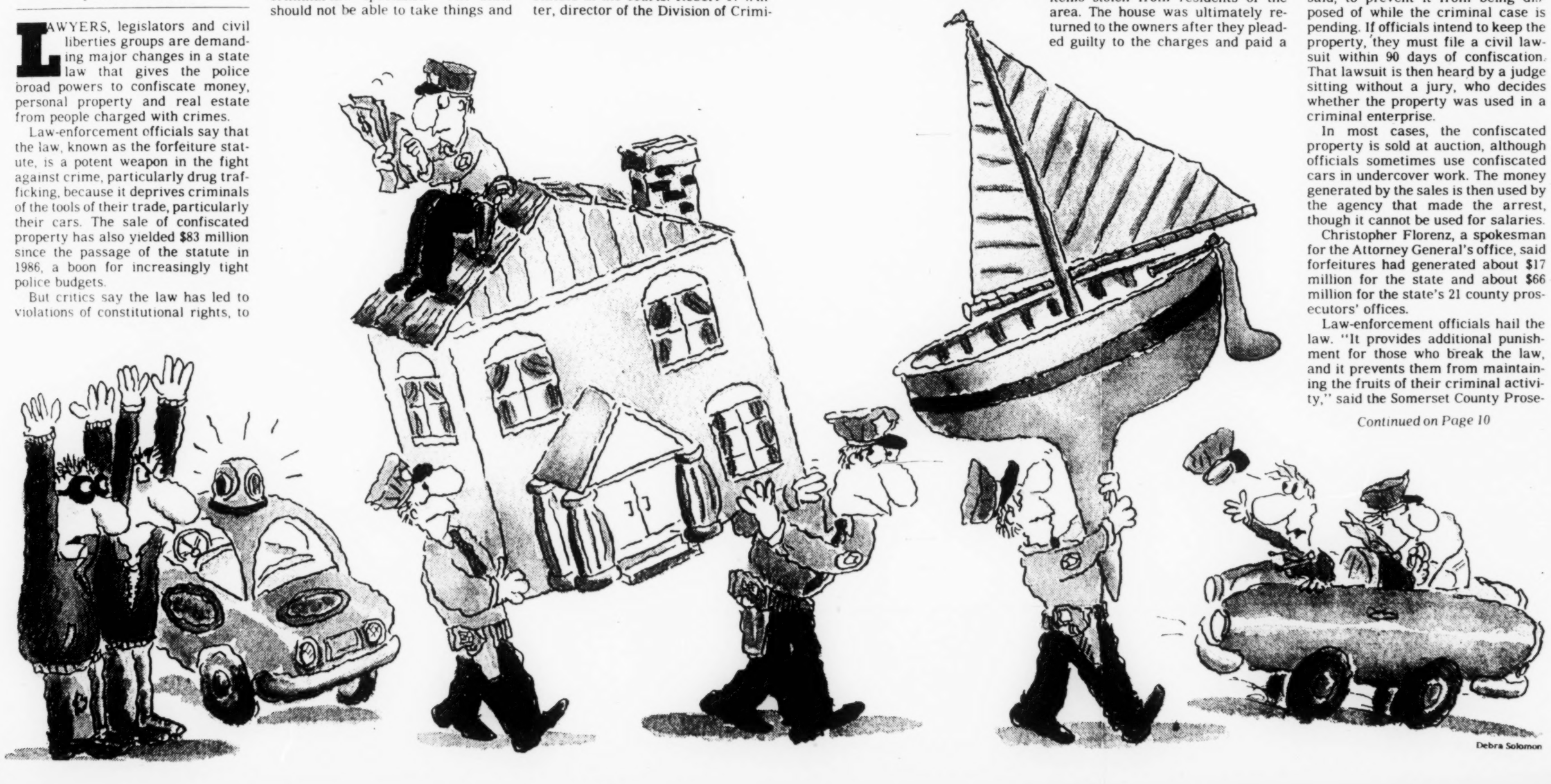

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Protests Mounting On Police Confiscations

Continued From Page 1

cutor, Nicholas L. Bissell Jr.

Mr. Bissell was a central figure in a recent forfeiture that has increased criticism of the 1986 statute.

In that case, a Somerset County insurance agent, James Guiffre, was arrested in his home on charges of possession of a half-ounce of cocaine. Within 26 hours of the arrest, after learning that he could lose his house to forfeiture, he entered into a plea agreement with the prosecutor's office. Mr. Guiffre agreed to become an informant in another drug case and to transfer title to two vacant lots he owned in Raritan Township to Somerset County.

Two years earlier, Mr. Guiffre had paid $174,000 for the lots; they were sold at auction by the county for $20,000.

Civil Suit Filed

Last May, Mr. Guiffre filed a Federal civil suit against Somerset County, Mr. Bissell and others for damages resulting from the transaction. He said he had been under duress when he entered into the plea agreement with the prosecutor's office. The suit is still pending.

The State Attorney General's office has investigated the Guiffre case and concluded that Mr. Bissell broke no laws. But critics of the forfeiture statute have pointed to the incident — and Mr. Bissell's belief that forfeiture provides "additional punishment" for lawbreakers — as evidence of major flaws in the forfeiture law.

"It indirectly enhances penalties enormously," said Eric Neisser, a professor of constitutional law at the Rutgers University Law School in Newark. He offered an example.

A person caught smoking marijuana outside his or her car, Mr. Neisser said, would ordinarily be subject to a minimal fine. But if the same person had been caught doing the same thing inside the car, the authorities could legally confiscate the car.

"Instead of a $100 fine, you have a $5,000 car seized," he said. And that, he added, gives the police a far more powerful bargaining tool than the fines and penalties the Legislature has decided are appropriate for such a crime.

"You let the cops keep the car, and you can stay out of jail," he said, referring to the reasoning a typical defendant might use when attempting to plea-bargain in such a case. "But that's an inappropriate penalty and an inappropriate pressure, and I don't think the public is aware of it."

An even more offensive situation occurs, he said, when the confiscated property belongs to someone else.

"If a kid borrows his dad's car for the night," Mr. Neisser asked, "should the father lose his car because the kid got caught smoking marijuana in it?"

Prosecutors say that while such situations are possible, they do not occur very often. And when they do, it is usually because the owner of the car was involved in the crime that led to the seizure.

Donald A. Regan of Montvale claims to be one of the exceptions. Three years ago he gave an acquaintance a ride into Manhattan. When they returned to New Jersey, agents of the Bergen County Narcotics Task Force stopped them. Drugs were found in the car and on Mr. Regan's passenger. Both men were arrested.

Mr. Regan insisted that he had no knowledge of the drugs, but the police confiscated his car.

The other man pleaded guilty to drug possession, and all charges against Mr. Regan were dismissed. But Mr. Regan is still fighting to get back his car.

"I've just gotten the runaround," Mr. Regan said. "My case is still in limbo."

John J. Fahy, the Bergen County Prosecutor, said that even though the charges against Mr. Regan were dismissed, officials were proceeding with the forfeiture action because of statements made by Mr. Regan's co-defendant implicating Mr. Regan in the crime and because the police had followed the men to an area of Manhattan known as a place to buy drugs.

Illustrates Objections

The case illustrates several objections leveled at the forfeiture law. For one thing, said Marsha Wenk, a staff lawyer for the New Jersey chapter of the American Civil Liberties Union, it demonstrates how the burden of proof in a forfeiture case shifts from the state to the defendant.

In a criminal case, Ms. Wenk said, the state has to prove that the defendant committed the crime. But in a forfeiture case, which is a civil case, the tables are turned and the defendant must convince a judge of his innocence to get back his property.

Mr. Regan, for example, has to prove that he had no knowledge of the presence of drugs in his car. "And it's very difficult to prove the absence of knowledge," Ms. Wenk said.

The Regan case also casts light on procedures that Ms. Wenk said were probably in violation of the due process clause of the United States Constitution. "The seizure is based simply on a police officer's belief that the property was used in a crime," she said. "That's not a standard that we use in any other setting."

Ms. Wenk also criticized the length of time during which people like Mr. Regan must do without their property. Law-enforcement officials have 90 days in which to file a forfeiture action, and once that is filed, the civil hearing before the judge to decide whether the property should be returned is usually not held until the conclusion of the underlying criminal case. Meanwhile, the confiscated

Debra Solomon

Even if the accused is not guilty, Ms. Wenk said, there is pressure to plead guilty and not take a chance on a trial — to play it safe by trading away the property. "The prosecutors plea-bargain away leniency for property," she said.

The Civil Liberties Union, she added, is looking for an "appropriate" case it can use to challenge the forfeiture law as it is currently being implemented.

At the same time, some state legislators have also called for major changes in the law.

Last month, Assemblyman Walter J. Kavanaugh, Republican of Somerville, introduced a resolution that would ask Congress to amend the Federal forfeiture law, upon which the New Jersey law is based, to make the property that is subject to forfeiture proportional to the crime.

With such a proportionality provision, Mr. Kavanaugh said, officials would not be permitted to confiscate highly valuable property for relatively minor crimes.

And in June, Assemblyman E. Scott Garrett, Republican of Wantage, introduced legislation that would require that a defendant be convicted of a crime before his property could be forfeited.

"Under the current law, your property can be taken away and there may never even be a conviction," Mr. Garrett said. "It's a way for the police to avoid having to go through a criminal trial. Instead, they can say, 'Just give us the car and we'll drop all the charges,' and they're allowed to do that."

New Regulations Expected

Mr. Winter, of the state's Division of Criminal Justice, said he expected new regulations about the enforcement of the forfeiture law to be proposed within the next couple of weeks. He declined to be specific as to the nature of the proposed changes.

The state's prosecutors, however, say the law is working nicely just the way it is.

"We do a lot of forfeiture here," said John Kaye, the Monmouth County Prosecutor. In an average year, Mr. Kaye said, his office confiscates about 300 automobiles, which are then sold at public auction. "We also take a couple of boats and a good bit of cash." ■

No. 91-781

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

THE UNITED STATES OF AMERICA,
Petitioner,

v.

A PARCEL OF LAND, BUILDINGS, APPURTENANCES AND IMPROVEMENTS KNOWN AS 92 BUENA VISTA AVENUE, RUMSON, NEW JERSEY, and BETH ANN GOODWIN,
Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF THE AMERICAN LAND TITLE ASSOCIATION AND THE MORTGAGE BANKERS ASSOCIATION OF AMERICA AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-781

THE UNITED STATES OF AMERICA,
Petitioner,
v.
A PARCEL OF LAND, BUILDINGS, APPURTENANCES AND IMPROVEMENTS KNOWN AS 92 BUENA VISTA AVENUE, RUMSON, NEW JERSEY, and BETH ANN GOODWIN,
Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF THE AMERICAN LAND TITLE ASSOCIATION AND THE MORTGAGE BANKERS ASSOCIATION OF AMERICA AS AMICI CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF THE AMICI CURIAE

The American Land Title Association (ALTA) and the Mortgage Bankers Association of America (MBAA) jointly submit this brief as amici curiae in support of respondent.[1] The ALTA is the national trade association of the land title industry. The ALTA has approximately 2,300 members, including land title insurers, title insurance agents, abstracters, and associate members. The principal function of the land title industry is to facili-

[1] The filing of this amicus brief is accompanied by the written consent of the Solicitor General on behalf of the United States and of counsel for the respondent Beth Ann Goodwin.

tate the safe, certain, and efficient transfer of title to real estate in both residential and commercial transactions by ascertaining and insuring the rights of purchasers, mortgage lenders and others in the real estate that is the subject of those transactions.

The MBAA is the primary national trade association devoted exclusively to the field of mortgage and real estate finance. Mortgage banking firms, which make up the largest portion of the total MBAA membership of 2,600 corporations, engage directly in originating, financing, selling and servicing mortgages.[2] In 1990, the latest year for which data is available, mortgage bankers originated more than $102 billion in single family mortgages and serviced in excess of $900 billion in single-family mortgages. MBAA members originate and service up to 80 percent of the mortgages used to finance home purchases through programs designed by Congress to encourage home ownership by facilitating low down payment loans to home buyers. In 1990, the MBAA member origination volume in these programs (the FHA mortgage insurance program of the Department of Housing and Urban Development and the home loan guaranty program of the Department of Veterans Affairs) was approximately $45 billion.

Amici are interested in this case because of their concern that the rights of innocent mortgage lenders and other bona fide purchasers for value be adequately protected in forfeiture proceedings. Mortgage loans—i.e., loans in which the borrower's obligation to pay the principal amount of the loan and the interest due on the loan is secured by a lien on real estate owned by the borrower —are an important means of providing credit in the

[2] "Origination" refers to the creation of the mortgage by negotiating, arranging, and funding the loan to home buyers. "Servicing" refers to collecting payments on existing loans, monitoring the payment of real property taxes and other charges to protect the priority of the mortgage lien, and facilitating the realization of the security in the event of nonpayment.

United States. Loans worth hundreds of billions of dollars are secured by mortgages on residential and commercial real estate. Furthermore, mortgage loans constitute an integral part of the process by which most real estate in the United States is bought and sold. In a typical real estate transaction, the buyer borrows a substantial portion of the purchase price from a mortgage lender, and in return grants a first lien on the real estate to the mortgage lender as security for its loan. The security provided to the lender by its mortgage lien is a vital element of the loan transaction. The security provided by the mortgage lien enables borrowers to obtain mortgage loans on more favorable terms and conditions than would be the case in the absence of an enforceable mortgage lien.[3] In particular, any modification of the essential terms of home mortgages, which typically are secured only by the principal residence of the mortgagor, would have serious adverse affects on the nationwide residential mortgage markets and ultimately on future home buyers.

From the perspective of mortgage lenders, therefore, the security interest represented by the mortgage lien is an important and valuable interest—and one that should be protected in a forfeiture proceeding. In this case, however, the United States takes the position that the relation-back doctrine, which provides that the interest of the United States in property subject to forfeiture relates back to the date of the first illegal activity giving rise to the forfeiture, cuts off any subsequently-acquired rights in the property, including those claimed by innocent mortgage lenders who acquired their property as bona fide purchasers in good faith for value. Consequently, the

[3] Federal regulations promulgated by the Department of Housing and Urban Development (HUD) governing the secondary mortgage market require that mortgage loans insured by HUD must be secured by a lien on the real property securing the loan. *See* 24 C.F.R. § 340.25 (1991). This is simply one illustration of the important role that mortgage liens play in the real estate market.

position taken by the United States would leave innocent mortgage lenders without any statutory protection in civil forfeiture proceedings in which the lien attached after the commencement of the illegal activity giving rise to forfeiture. Other innocent bona fide purchasers for value would similarly be denied statutory protection as innocent owners. Amici believe this result is contrary to Congress's intent when it established statutory protection for innocent owners in civil forfeiture proceedings.

SUMMARY OF ARGUMENT

Congress intended the civil forfeiture innocent owner provisions of statutes such as 21 U.S.C. § 881(a)(6) to protect innocent bona fide purchasers for value who acquired their interests in the property subsequent to the occurrence of the illegal activity giving rise to the forfeiture. Both the statutory language and the legislative history of 21 U.S.C. § 881(a)(6) demonstrate that Congress intended to protect such innocent owners, and did not intend the relation-back doctrine to defeat the rights of such innocent owners. The remission and mitigation procedures of the Department of Justice, which are considered a matter of administrative grace and are not subject to judicial review, are not a satisfactory substitute for the statutory protection provided to innocent owners, and Congress did not intend these procedures to be the only remedy available to innocent bona fide purchasers for value who acquired their interests in the property subsequent to the occurrence of the illegal activity giving rise to the forfeiture. Finally, the interpretation of the relation-back doctrine advanced by the United States violates the due process clause of the Fifth Amendment.

ARGUMENT

I. INNOCENT BONA FIDE PURCHASERS FOR VALUE WHO ACQUIRED THEIR INTERESTS IN THE PROPERTY SUBSEQUENT TO THE OCCURRENCE OF THE ILLEGAL ACTIVITY GIVING RISE TO THE FORFEITURE CAN BE STATUTORY INNOCENT OWNERS UNDER 21 U.S.C. § 881(a)(6).

The question on which this Court granted certiorari is whether a donee can be an innocent owner within the meaning of 21 U.S.C. § 881(a)(6). That question, however, implicates a broader and more significant issue—whether the relation-back doctrine when applied in civil forfeiture proceedings defeats every innocent claimant who acquired his interest in the property subsequent to the occurrence of the illegal activity giving rise to the forfeiture, including innocent bona fide purchasers for value. The United States squarely takes the position that the innocent owner defense "can only be asserted by a claimant who acquired an interest in the property *before* commission of the act triggering the forfeiture." U.S. Br. at 5 (emphasis in original). If this is so, then *all* claimants—not simply donees—who acquired their interests in the property subsequent to the occurrence of the illegal activity giving rise to the forfeiture can never qualify as innocent owners.

Nor is the impact of this case limited to innocent owners asserting claims under 21 U.S.C. § 881(a)(6). The innocent owner provisions of all the principal civil forfeiture statutes are virtually identical. *Compare* 21 U.S.C. § 881(a)(6) (1988) *with* 21 U.S.C. § 881(a)(4) & (a)(7) (1988) *and* 18 U.S.C. § 981(a)(2) (1988) *and* 18 U.S.C. § 2254(a)(2) (1988). Consequently, the issue presented in this case is not limited to the innocent owner provision in 21 U.S.C. § 881(a)(6), but applies generally to innocent owner provisions in all civil forfeiture statutes.

The government attempts to avoid the broad impact of its position by maintaining that "[t]his case concerns

only the recipient of a gift of drug proceeds. It is therefore unnecessary for the Court to decide in this case whether a bona fide purchaser of drug proceeds could seek to block a forfeiture under Section 881(a)(6)." U.S. Br. at 36 n. 13. The government, however, does not explain how the Court can decide this case on the basis of the arguments advanced by the United States without necessarily deciding whether a subsequent bona fide purchaser is also precluded from claiming to be an innocent owner. As the court below noted, the civil forfeiture innocent owner provision does not appear to provide a basis for distinguishing between claimants who are bona fide purchasers and other types of claimants. *See* 937 F.2d at 101-02. Therefore, it is pure sophistry for the government to suggest that the Court's holding will be limited to claimants who happen to be donees. If the Court adopts the rationale advanced by the United States, then all innocent claimants who acquired their interests in the property subsequent to the occurrence of the illegal activity giving rise to the forfeiture—including mortgage lenders and other bona fide purchasers for value—will be foreclosed from claiming to be innocent owners.

A. Congress Provided Statutory Protection For Innocent Owners In Forfeiture Proceedings.

In the past fifteen years Congress has progressively expanded the scope of civil and criminal forfeiture, so that property involved in a broad range of illegal activity is now subject to forfeiture.[4] Civil forfeiture provisions authorized in rem proceedings based on the legal fiction that the property itself is the wrongdoer. *See Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680-83 (1974). Numerous statutes authorize civil forfeiture

[4] *See, e.g.*, Psychotropic Substances Act of 1978, Pub. L. No. 95-633, 92 Stat. 3768 (1978); Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976 (1984); Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat 3207 (1986); Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988).

proceedings. *E.g.*, 21 U.S.C. § 881 (1988); 18 U.S.C. § 981 (1988); 18 U.S.C. § 2254 (1988). In contrast, criminal forfeiture statutes authorize in personam proceedings, in which forfeiture occurs in connection with an individual's conviction of a crime. Many statutes authorize criminal forfeiture proceedings. *E.g.*, 21 U.S.C. § 853 (1988); 18 U.S.C. § 1467 (1988); 18 U.S.C. § 1963 (1988); 18 U.S.C. § 2253 (1988).

Recognizing the severity of forfeiture at common law, Congress provided statutory protection for the rights of innocent owners in connection with both civil and criminal forfeiture proceedings. As the government noted, the language of the typical civil forfeiture innocent owner provision differs from the corresponding criminal forfeiture innocent owner provision. The typical civil forfeiture innocent owner provision states that "no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner." 21 U.S.C. § 881(a)(6) (1988); *see also* 18 U.S.C. § 981(a)(2) (1988); 18 U.S.C. § 2254(a)(2) (1988); 21 U.S.C. § 881(a)(7) (1988).[5] In contrast, the typical

[5] Courts have uniformly held that a mortgage lender or other lienholder qualifies as an innocent owner for purposes of 21 U.S.C. § 881. *See United States v. Federal National Mortgage Ass'n*, 946 F.2d 264, 266 (4th Cir. 1991); *In re Newport Savings & Loan Ass'n*, 928 F.2d 472, 476 (1st Cir. 1991); *United States v. Six Parcels of Real Property*, 920 F.2d 798, 799 (11th Cir. 1991); *United States v. One Urban Lot Located at 1 St. A-1, Valparaiso, Bayamon, P.R.*, 865 F.2d 427 (1st Cir. 1989); *In re Metmor Financial, Inc.*, 819 F.2d 446, 448 n.2 (4th Cir. 1987); *United States v. One Parcel of Property Located at Route 1, Box 137, Randolph, Chilton County, Alabama*, 743 F. Supp. 802, 807-08 (M.D. Ala. 1990); *United States v. One Single Family Residence Located at 6960 Miraflores Ave.*, 731 F. Supp. 1563 (S.D. Fla. 1990), *appeal dismissed*, 932 F.2d 1433 (11th Cir. 1991), *cert. granted on other grounds*, No. 91-767, 60 U.S.L.W. 3578 (Feb. 25, 1992); *United States v. Parcel of Real Property Known as 708-710 W. 9th Street,*

criminal forfeiture innocent owner provision enables a claimant, who can establish either that "the right, title, or interest [in the property subject to forfeiture] was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property," or that "the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section," to obtain an amendment of the forfeiture order exempting his property from forfeiture. *See* 21 U.S.C. § 853(n)(6) (1988); *see also* 18 U.S.C. § 982(b)(i) (1988); 18 U.S.C. § 1467 (*l*)(6) (1988); 18 U.S.C. § 1963(*l*)(6) (1988); 18 U.S.C. § 2253(m)(6) (1988).

Congress also codified the relation-back doctrine in many forfeiture statutes, both civil, *see* 21 U.S.C. § 881 (h) (1988); 18 U.S.C. § 981(f) (1988); 18 U.S.C. § 2254(g) (1988), and criminal. *See* 18 U.S.C. § 1467(b)

Erie, Pa., 715 F. Supp. 1323, 1326 (W.D. Pa.), *vacated on other grounds sub nom. United States v. Parcel of Real Property Known as 6109 Grubb Road, Millcreek Tp., Erie County, Pa.*, 886 F.2d 618 (3d Cir. 1989); *United States v. Real Property Constituting Approximately Fifty (50) Acres*, 703 F. Supp. 1306, 1312 (E.D. Tenn. 1988); *United States v. Real Property Titled in the Name of Shashin, Ltd.*, 680 F. Supp. 332, 334 (D. Hawaii 1987); *United States v. All That Tract and Parcel of Land: 2306 N. Effel Court*, 602 F. Supp. 307, 312 (N.D. Ga. 1985); *United States v. One Piece of Real Estate, Described in Part As: 1314 Whiterock and Improvements, San Antonio, Bexar County, Tex.*, 571 F. Supp. 723, 725 (W.D. Tex. 1983). *But see United States v. Premises and Real Prop. at 4492 S. Livonia Rd., Livonia, N.Y.*, 667 F. Supp. 79, 85 n.2 (W.D.N.Y. 1987) (court suggests in dicta that § 881(a)(7) innocent owner provision does not appear to cover interests held by a lienor or mortgagee), *aff'd on other grounds*, 889 F.2d 1258 (2d Cir. 1989). The innocent owner provision in 18 U.S.C. § 918 (a)(2), which is otherwise identical to the innocent owner provision in 21 U.S.C. § 881, specifically refers to the interest of an "owner or lienholder." *See* 18 U.S.C. § 981(a)(2) (1988).

(1988); 18 U.S.C. § 1963(c) (1988); 18 U.S.C. § 2253 (b) (1988); 21 U.S.C. § 853(c) (1988). The relation-back doctrine is a long-standing common-law doctrine that provides that the title of the United States in property subject to forfeiture relates back to the time of the illegal event giving rise to the forfeiture. *See Texas v. Donohue*, 302 U.S. 284 (1937); *Motlow v. State ex rel. Koeln*, 295 U.S. 97 (1935); *United States v. Stowell*, 133 U.S. 1, 16-17 (1890); *In re Thacher's Distilled Spirits*, 103 U.S. 679 (1880); *In re Henderson's Distilled Spirits*, 81 U.S. (14 Wall.) 44 (1871); *United States v. 1960 Bags of Coffee*, 12 U.S. (8 Cranch) 398 (1814); *United States v. Grundy*, 7 U.S. (3 Cranch) 337, 348-54 (1806).

It is clear that the criminal forfeiture innocent owner provision protects innocent mortgage lenders and other bona fide purchasers for value who acquired their interests in the property subsequent to the time of the illegal activity giving rise to the forfeiture, despite the relation-back doctrine. This is apparent from provisions such as 21 U.S.C. § 853(n)(6), which provide that the order of forfeiture "shall be amended" if the claimant establishes that it is a bona fide purchaser for value reasonably without cause to believe that the property was subject to forfeiture. It is also clear from provisions such as 21 U.S.C. § 853(c), which codifies the relation-back doctrine in criminal forfeiture proceedings. The criminal forfeiture relation-back provision specifically excepts from forfeiture the property of claimants who satisfy the bona fide purchaser standard of 21 U.S.C. § 853(n)(6). *See* 21 U.S.C. § 853(c) (1988); *see also* 18 U.S.C. § 1467(b) (1988); 18 U.S.C. § 1963(c) (1988); 18 U.S.C. § 2253(b) (1988). The United States agrees with this reading of the criminal forfeiture innocent owner provision. *See* U.S. Br. at 30-32.

Unlike the criminal forfeiture provision, the civil forfeiture relation-back provision does not refer directly to the civil forfeiture innocent owner provision. The typical civil forfeiture relation-back provision simply states:

> All right, title, and interest in property described in subsection (a) of this section shall vest in the United States upon commission of the act giving rise to forfeiture under this section.

21 U.S.C. § 881(h) (1988); *see also* 18 U.S.C. § 981(f) (1988); 18 U.S.C. § 2254(g) (1988). The United States considers this distinction between the civil and criminal innocent owner provision as one of the factors supporting its position in this case. *See* U.S. Br. at 12.

B. The Civil Forfeiture Innocent Owner Provision Protects Subsequent Bona Fide Purchasers For Value.

Despite the differences between the innocent owner provisions in criminal and civil forfeiture, a careful consideration of section 881(a)(6) and section 881(h) shows that Congress did indeed intend the civil forfeiture innocent owner provision to protect innocent bona fide purchasers for value who acquired their interests in the property subsequent to the occurrence of the illegal activity giving rise to the forfeiture, notwithstanding the relation-back doctrine. Section 881(a)(6) was enacted in 1978, six years prior to the enactment of section 881(h) in 1984. *See* Psychotropic Substances Act of 1978, § 301, Pub. L. No. 95-633, 92 Stat. 3768 (1978); Comprehensive Crime Control Act of 1984, § 306, Pub. L. No. 98-473, 98 Stat. 1976 (1984). Section 881(a)(6) clearly excepts from forfeiture property "to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner." *See* 21 U.S.C. § 881(a)(6) (1988). The plain language of section 881(a)(6) protects an innocent owner without regard to the time of the illegal activity giving rise to forfeiture. This broad construction of section 881(a)(6) is supported by the Joint Explanatory Statement that accompanied the legislation, which stated: "Finally it should be pointed out that no property would be forfeited under the Senate amendment to the extent

of the interest of any innocent owner of such property. The term 'owner' should be broadly interpreted to include any person with a recognizable legal or equitable interest in the property seized." Joint Explanatory Statement of Titles II & III of the Psychotropic Substances Act of 1978, 124 Cong. Rec. S17647 (Oct. 7, 1978). There simply is no indication in either the statute or its legislative history that the protection for innocent owners was limited to claimants who acquired their property prior to the occurrence of the illegal activity giving rise to the forfeiture.

When subsection 881(h) was enacted six years later, there was no indication that its enactment was intended to limit the existing protection for innocent owners provided by section 881(a)(6). As the court of appeals below determined, section 881(h) vests title in the United States "in that property described in subsection (a)." Subsection 881(a) lists the property that "shall be subject to forfeiture," but obviously section 881(a)(6) excepts an innocent owner's property from forfeiture. Because of the language of section 881(a)(6), an innocent owner's property is not subject to forfeiture under subsection 881(a), and therefore the relation-back provision of section 881(h) does not apply to an innocent owner's property. As the court below reasoned, "If the property is exempted from forfeiture pursuant to an innocent owner defense and therefore is not forfeitable property under subsection (a), then section 881(h) does not apply to such property that is not subject to forfeiture." 937 F.2d at 102.

This construction of subsections 881(a) and 881(h) is buttressed by the statements of the proponents of the section 881(a)(6) innocent owner provision. The innocent owner language resulted from an amendment offered by Senators Nunn, Mathias and Wallop intended "to make it clear that a bona fide party who has no knowledge or consent to the property he owns having been derived from an illegal transaction, that party would be

able to establish that fact under this amendment and forfeiture would not occur." Remarks of Senator Nunn, 124 Cong. Rec. 23057 (July 27, 1978), *cited in United States v. Parcel of Real Prop. Known as 6109 Grubb Road, Millcreek Tp., Erie County, Pa.*, 886 F.2d 618, 625 (3d Cir. 1989). Senator Culver of Iowa stated "that the original language could have been construed to reach properties traceable to the illegal proceeds but obtained by an innocent party without knowledge of the manner in which the proceeds were obtained. The original language is modified in the proposed amendment in order to protect the individual who obtains ownership of proceeds with no knowledge of the illegal transaction." Remarks of Senator Culver, 124 Cong. Rec. 23056 (July 27, 1978), *cited in United States v. Parcel of Real Prop. Known as 6109 Grubb Road, Millcreek Tp., Erie County, Pa.*, 886 F.2d 618, 625 (3d Cir. 1989).

Both of these statements addressed a situation in which the illegal activity occurred prior to the time that the innocent owner acquired his interest in the property. Senator Nunn described a bona fide owner who had no knowledge that his property was "derived" from an illegal transaction. Senator Culver thought the provision protected an owner who obtains "ownership of proceeds with no knowledge of the illegal transaction." For the government's position to be correct, both of these Senators had to completely misunderstand the effect of the amendment they were supporting.

The United States attempts to avoid the impact of this legislative history simply by asserting that it is inconsistent with the language of the innocent owner provision, but fails to offer a convincing explanation why Congress would have included the innocent owner language in a provision authorizing the forfeiture of the proceeds of illegal activity, as section 881(a)(6) does, if not to protect subsequent bona fide purchasers for value. Given what it means for property to be the "proceeds" of illegal activity, a forfeiture of proceeds is far more

likely to involve innocent claimants who acquired their interest in the property subsequent to the date of the illegal activity than it is to involve claimants who somehow acquired an interest in the property prior to the time that it became the proceeds of illegal activity.[6]

The United States also contends that the distinction between the innocent owner provision in civil forfeiture and its counterpart in criminal forfeiture demonstrates that Congress intended to protect subsequent bona fide purchasers for value in criminal forfeiture proceedings but not in civil forfeiture proceedings. The difficulty with the government's argument is that it directly conflicts with the legislative history of section 881(a)(6) discussed above. Furthermore, the government offers no rational explanation why Congress would have intended to protect subsequent bona fide purchasers for value in criminal forfeiture proceedings while denying the same protection to such claimants in civil forfeiture proceedings.[7] Absent some indication of a rational purpose be-

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[6] The United States describes a hypothetical situation in which an innocent owner lends money to a criminal who then uses the funds to bankroll a drug transaction. When a bank account representing the proceeds of the transactions is seized, the innocent owner could assert a claim of innocent ownership to the account. The United States claims this hypothetical represents "an important class of property owners." *See* U.S. Br. at 27 n.8. Even assuming for the sake of argument that this hypothetical represents an "important class of property owners," there is no evidence that Congress had this and only this class of innocent owners in mind when it enacted the innocent owner provision in section 881(a)(6). Furthermore, common sense suggests that the number of persons in the government's hypothetical class is small compared to the numbers of subsequent bona fide purchasers that are likely to be affected by a forfeiture of proceeds.

[7] The government hypothesizes that Congress intended the criminal forfeiture innocent owner provision to ensure that "this criminal sanction visits hardship on the convicted defendant and not others unlikely to be involved in the offense or in sheltering the defendant's property. [Citation omitted] That rationale does not necessarily apply to civil forfeitures, which have always regarded

hind such a distinction, the more reasonable conclusion to be drawn from the corresponding criminal forfeiture innocent owner provision is that Congress intended to provide the same protection in both civil and criminal forfeiture proceedings.

Nor does it bolster the government's argument to emphasize the harshness of forfeiture at common law and the fact that early forfeiture cases, such as *United States v. 1960 Bags of Coffee*, 12 U.S. (8 Cranch) 398 (1814), held that the innocence of the owner was no defense to forfeiture. *See* U.S. Br. at 2. It was precisely to ameliorate the harshness of the common law rule that Congress enacted statutory innocent owner protections. Furthermore, if Congress enacted the civil forfeiture innocent owner provision solely for the purpose of protecting innocent claimants who acquired their interest in the property *prior* to the time of the illegal activity giving rise to the forfeiture—which is the government's position—then Congress engaged in a largely futile act. As this Court's decision in *United States v. Stowell*, 133 U.S. 1 (1890), clearly demonstrates, the common law relation back doctrine *did not* defeat the rights of a claimant who acquired his interest in the property prior to the time of the illegal activity giving rise to the forfeiture. *See* 133 U.S. at 19-20 ("It being admitted that the business of a distiller was not carried on with the mortgagee's permission or connivance, and that he did not even know that a still had been set up on the premises, it follows . . . that the mortgage is valid as against the United States, and that, so

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the property as the 'offender.'" U.S. Br. at 32-33 n.11. This proposed explanation simply repeats the distinction between civil and criminal forfeiture and does not explain why Congress would want to protect innocent claimants in criminal forfeiture proceedings but not in civil forfeiture proceedings. Under the government's construction, civil forfeiture certainly will "visit hardship" on innocent owners "unlikely to be involved in the offense." If Congress simply wanted to leave innocent persons to their fate at common law civil forfeiture, there was no reason for it to adopt an innocent owner provision at all.

far as concerns the real estate, the judgment of condemnation must be against the equity of redemption only.").

The government is properly concerned that confederates of criminals will attempt to use innocent owner provisions to shield property from forfeiture. It is unnecessary, however, to cut off the rights of every innocent claimant who acquired his interest in the property subsequent to the occurrence of the illegal activity giving rise to the forfeiture—including innocent bona fide purchasers for value—in order to prevent criminals from shielding their assets through confederates. It is well-established that once the government establishes probable cause that property is subject to civil forfeiture, the burden of proof shifts to the putative innocent owner to prove his innocence. *See, e.g., United States v. Parcel of Land and Residence Located Thereon at 5 Bell Rock Rd., Freetown, Mass.*, 896 F.2d 605, 609 (1st Cir. 1990); *United States v. Premises and Real Prop. at 4492 S. Livonia Rd., Livonia, N.Y.*, 889 F.2d 1258, 1267 (2d Cir. 1989); *United States v. Banco Cafetero Panama*, 797 F.2d 1154, 1160 (2d Cir. 1986); *United States v. All That Ground Known As 2511 E. Fairmont Ave., Baltimore, Md.*, 772 F. Supp. 1273, 1277 (D. Md. 1989). It appears unlikely that those who are associated closely enough with criminals to receive substantial gifts of money or property will be able to discharge their burden of proving that they had no knowledge of the illegal activity. There is no reason to assume that factfinders will be unable to determine when claimants are "innocent" under the standard established by section 881(a)(6).[8]

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[8] The government is troubled that donees may succeed in qualifying as innocent owners. It is not unreasonable for Congress to have made the judgment, however, that truly innocent donees should not suffer the hardship of having to repay to the United States donations that had already been received, budgeted and spent. The criminal no longer has the use of his money, and while the United States would be unable to recover the assets for the forfeiture fund, Congress may have viewed that as the preferable alternative to

C. Administrative Remission and Mitigation Procedures Are No Substitute for the Statutory Innocent Owner Defense.

The United States argues that the Court need not be concerned if the relation-back doctrine is interpreted as defeating the right of an innocent claimant who acquires an interest in the forfeited property after the occurrence of the illegal act giving rise to forfeiture, because an innocent bona fide purchaser should be able to recover the forfeited interest in the property by petitioning the Department of Justice for remission and mitigation. U.S. Br. at 35-41; *see* 21 U.S.C. § 881(d) (1988); 28 C.F.R. §§ 9.1-9.7 (1991). The administrative authority to remit or mitigate forfeiture, however, is not a satisfactory remedy for an innocent bona fide purchaser, for a number of reasons.

First, it is well-established that an innocent claimant has no right to remission or mitigation; the decision whether to grant remission or mitigation is entirely a matter of grace, normally not subject to judicial review.[9] Decisions on remission and mitigation are made by the

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recovering funds from innocent donees. Criminals are not typically in business in order to donate funds to recognized charities, and the rights of subsequent bona fide purchasers for value should not be sacrificed in order to preclude the possibility that a criminal could distribute the proceeds of his illegal activity to truly innocent donees.

[9] *See, e.g., Ivers v. United States*, 581 F.2d 1362, 1371 (9th Cir. 1978); *United States v. One 1973 Buick Riviera Auto. VIN 4Y87U3H548756*, 560 F.2d 897 (8th Cir. 1977); *United States v. One 1972 Mercedes-Benz 250*, 545 F.2d 1233, 1236 (9th Cir. 1976). The Court has suggested that in an extreme case judicial review of the administration of remission and mitigation may be available. *See United States v. United States Coin and Currency*, 401 U.S. 715, 721 (1971). It is unclear whether this judicial review extends beyond the authority to order the relevant administrative official to consider remission petitions rather than rejecting the petitions wholesale. *See United States v. Edwards*, 368 F.2d 722 (4th Cir. 1966).

Director of the Office of Asset Forfeiture, a non-judicial official in the Criminal Division of the Department of Justice. *See* 28 C.F.R. § 9.3(d) (1991); United States Dep't of Justice, *Annual Report of the Department of Justice Asset Forfeiture Program* (1990) at 6, 13. Assets resulting from forfeitures are deposited in the Assets Forfeiture Fund, administered by the Department of Justice, and payments to innocent persons in connection with remission and mitigation are also made from this fund. *See* U.S. Br. at 38. The remission regulations promulgated by the Department of Justice provide explicitly that even when a claimant has satisfied the standards for obtaining remission set forth in the regulations, the Department may still refuse to grant a complete recovery to the claimant. The regulations state: "In addition to having the discretionary authority to grant relief by way of complete remission of forfeiture, the determining official may, in the exercise of discretion, mitigate forfeitures of seized property. *Mitigation may also be granted when the minimum standards for remission have been satisfied but the overall circumstances are such that, in the opinion of the determining official, complete relief is not warranted.*" 28 C.F.R. § 9.5(c) (1991) (emphasis added).

A procedure in which a claimant can satisfy the standards for remission but nevertheless be denied relief is not a satisfactory substitute for statutory protection of innocent bona fide purchasers. Nevertheless, according to the government's argument, innocent mortgage lenders and other bona fide purchasers for value should be content to have their petitions for remission heard by a non-judicial official, whose decisions are unreviewable, in the same agency that is responsible for prosecuting forfeiture actions and for administering the special fund in which the proceeds of forfeiture are deposited. It is no reflection on the ethics and professionalism of the officials of the Department of Justice to say that no official should be expected to perform such different functions at the same time, without the benefit of judicial review.

Secondly, an innocent mortgage lender is likely to receive a lesser recovery under the Department's remission and mitigation regulations than the lender would be entitled to receive under statutory innocent owner provisions. Recent cases have established that an innocent lender who qualifies as an innocent owner under 21 U.S.C. § 881(a)(6) is entitled to recover the outstanding principal balance of the loan, any unpaid interest that accrues up to the date the loan principal is repaid, and reasonable costs and attorney's fees incurred in protecting its lien in the forfeited property. *See United States v. Federal National Mortgage Ass'n*, 946 F.2d 264, 266-67 (4th Cir. 1991). In contrast, the remission and mitigation regulations prior to their amendment in 1987 did not permit recovery of interest accruing after the property was seized. *See United States v. 8.4 Acres of Land Located in Little River Tp., Horry County, S.C.*, 648 F. Supp. 79, 83 (D.S.C. 1986), *aff'd mem.*, 823 F.2d 549 (4th Cir. 1987); *United States v. One Piece of Real Estate, Described in Part As: 1314 Whiterock and Improvements, San Antonio, Bexar County, Tex.*, 571 F. Supp. 723 (W.D. Tex. 1983). Even today the regulations do not allow recovery of interest up to the date the principal is repaid, but instead allow recovery of unpaid interest only through the last full month prior to the granting of the remission petition.[10] The remission regulations also do not permit an innocent mortgage lender to recover its reasonable attorney's fees and costs. *See* 28 C.F.R. § 9.2(h) (1991).[11]

[10] The Department of Justice remission regulations provide that a lienholder may recover its "net equity" in forfeited property. 28 C.F.R. § 9.7(b) (1991). The regulations define "net equity" as "the amount of a lien-holder's monetary interest in property subject to forfeiture. Net equity is to be computed by determining the amount of unpaid principal and unpaid interest at the time of seizure, and by adding to that sum unpaid interest calculated from the date of seizure through the last full month prior to the date of the notification granting the petition." 28 C.F.R. § 9.2(h) (1991).

[11] The government refers to the recently established policy of expedited forfeiture settlement for mortgage holders, *see* U.S. Br. at 39, but fails to explain that in order to be eligible to benefit from this policy, a mortgage lender must establish that it qualifies as an innocent owner "as defined by the applicable forfeiture statute and case law." *See* United States Dep't of Justice, *Expedited Forfeiture Settlement Policy for Mortgage Holders* (April 1992) at 8. Obviously, if the government prevails in this case, mortgage lenders who acquired their interests in the property subsequent to the occurrence of the illegal activity giving rise to the forfeiture will not be innocent owners and consequently will be precluded from obtaining expedited settlements in civil forfeiture proceedings pursuant to this policy.

Third, the remission regulations require a claimant to satisfy a higher standard in order to obtain recovery than an innocent owner is required to show under the statutory innocent owner standard. The regulations provide for remission when the petitioner, *inter alia*, has "a valid, good faith interest in the seized property," had no knowledge of the illegal activity, and "had taken all reasonable steps to prevent the illegal use of the property." *See* 28 C.F.R. § 9.5(b) (1991). This standard for recovery under the remission regulations is derived from the standard for relief under the due process clause suggested by the Court in *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 689-90 (1974). That is, the Fifth Amendment's due process clause shields an innocent owner's property from forfeiture if the innocent owner can establish "not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property." *Id.* at 689-90. The Department's remission and mitigation regulations simply provide what the Constitution requires.[12]

[12] *See* 28 C.F.R. § 9.5(b) (1991). The authority for remission and mitigation is provided by 19 U.S.C. § 1618 (1988), incorporated in 21 U.S.C. § 881(d) (1988). Section 1618 authorizes remission if the petitioner can show that the forfeiture "was incurred without willful negligence or without any intention on the part of the petitioner to defraud the revenue or to violate the law . . . ." This language shows that a petitioner who establishes that he was not negligent is entitled to remission, even though the Department of

The statutory innocent owner provision applicable in civil forfeiture proceedings, however, provides a greater measure of protection to innocent owners than the Department's remission and mitigation regulations do. Claimants who establish lack of knowledge of the illegal activity giving rise to the forfeiture are not required to show that they did "all that reasonably could be expected to prevent the proscribed use" of the property. *See United States v. Lots 12, 13, 14, and 15, Keeton Heights Subdivision, Morgan County, Ky.*, 869 F.2d 942, 946-47 (6th Cir. 1989); *United States v. One Urban Lot Located at 1 St., A-1, Valparaiso, Bayamon, P.R.*, 865 F.2d 427, 430 (1st Cir. 1989); *United States v. $10,694.00 United States Currency*, 828 F.2d 233, 234 (4th Cir. 1987) (section 881 (a)(6) innocent owner need not establish that he had done all that reasonably could be expected); *United States v. Four Million Two Hundred Fifty Five Thousand Dollars*, 762 F.2d 895, 906 n.24 (11th Cir. 1985) (section 881 (a)(6) innocent owner need not establish that he had done all that reasonably could be expected), *cert. denied*, 474 U.S. 1056 (1986); *United States v. Certain Real Prop.*, 724 F. Supp. 908, 914 (S.D. Fla. 1989) (section 881(a)(7) innocent owner need not establish that he had done all that reasonably could be expected); *but see United States v. Premises Described as Route 2, Box 61-C, Crossett, Ark.*, 727 F. Supp. 1295, 1299 (W.D. Ark. 1990); *United States v. One Single Family Residence with Outbuildings Located at 15621 S.W. 209th Ave., Miami, Fla.*, 699 F. Supp. 1531, 1534 (S.D. Fla. 1988). Only when a claimant has knowledge of the illegal activity giving rise to the forfeiture, and therefore must establish its lack of consent to the illegal activity in order to qualify as an innocent owner, does it become necessary for the claimant to demonstrate that it took all reasonable steps

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Justice regulations impose a much more difficult burden. Since remission decisions are not subject to judicial review, the inconsistency between the governing statute and the regulations has gone unremedied.

to prevent the illegal use of the property. *United States v. Certain Real and Personal Property*, 943 F.2d 1292, 1296 (11th Cir. 1991); *United States v. One Single Family Residence Located at 15603 85th Avenue North*, 933 F.2d 976 (11th Cir. 1991); *United States v. Certain Real Property and Premises Known As 418 57th Street, Brooklyn, New York*, 922 F.2d 129 (2d Cir. 1990); *United States v. 141st Street Corp.*, 911 F.2d 870 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1017 (1991); *see also United States v. Property Identified as 908 T Street, N.W.*, 770 F. Supp. 697, 702 (D.D.C. 1991). Consequently, innocent mortgage lenders are held to a higher standard under the Department's remission and mitigation regulations than Congress itself established for innocent owners in statutory innocent owner provisions such as 21 U.S.C. § 881(a)(6).

In sum, the informal remedy provided by the opportunity to seek remission and mitigation of forfeiture is no substitute for the statutory right provided by civil forfeiture innocent owner provisions such as 21 U.S.C. § 881(a)(6).

II. THE INTERPRETATION OF THE RELATION-BACK DOCTRINE ADVANCED BY THE UNITED STATES VIOLATES THE DUE PROCESS CLAUSE.

The interpretation of the relation-back doctrine urged by the United States conflicts with the constitutional standard enunciated by the Court in *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 689-90 (1974). In *Pearson Yacht*, the Court stated:

> It would be difficult to reject the constitutional claim of an owner whose property subjected to forfeiture had been taken from him without his privity or consent. Similarly, the same might be said of an *owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property*; for in that cir-

> cumstance, it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive.

Id. at 609-610 (emphasis added) (citations and footnotes omitted).

Even if a subsequent bona fide purchaser were uninvolved in and unaware of the wrongful activity, and also had done all that reasonably could be expected to prevent the proscribed use of the property—the *Pearson Yacht* standard—the government's interpretation of the relation-back doctrine would still defeat the innocent purchaser's claim. "It has long been an axiom of statutory interpretation that where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Public Citizen v. United States Department of Justice*, 491 U.S. 440, 466 (1989) (quoting *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988)). It was precisely for this reason that the United States District Court for the Southern District of Florida held that the claim of a mortgage lender who acquired its lien subsequent to the occurrence of the illegal activity giving rise to the forfeiture was not defeated by the relation-back doctrine. *See United States v. One Single Family Residence Located at 6960 Miraflores Ave., Coral Gables, Fla.*, 731 F. Supp. 1563, 1569 (S.D. Fla. 1990), *appeal dismissed*, 932 F.2d 1433 (11th Cir. 1991), *cert. granted on other grounds*, No. 91-767, 60 U.S.L.W. 3578 (Feb. 25, 1992).[13]

[13] The few courts that have considered the issue are divided on whether the *Pearson Yacht* constitutional defense is available to innocent owners whose rights would otherwise be cut off by the relation-back doctrine. *Compare United States v. One 1951 Douglas DC-6 Aircraft*, 525 F. Supp. 13 (W.D. Tenn. 1979) (defense not available to subsequent bona fide purchaser whose interest was not perfected prior to the vesting of the government's interest), *aff'd*, 667 F.2d 502 (6th Cir. 1981), *cert. denied sub nom. Ernesto Zaragoza Y. v. United States*, 462 U.S. 1105 (1983) *with United States v. One 1976 Chevrolet Corvette, Serial No. 1Z37L6S419778*, 477 F. Supp. 32 (E.D. Pa. 1979) (defense available to subsequent bona fide purchaser whose rights would otherwise be cut off by the relation-back doctrine).

The government suggests that this constitutional issue can be avoided because an innocent claimant has the opportunity to seek remission. *See* U.S. Br. at 39 n.16. To the contrary, the remission and mitigation procedure cannot possibly be a satisfactory mechanism for adjudicating the constitutional rights of innocent claimants. In other contexts this Court has found it a violation of due process when an official acts in a judicial capacity at the same time that the fees and costs assessed by the official were used to augment his salary or accounted for a substantial part of the revenues of his jurisdiction. *See Ward v. Village of Monroeville*, 409 U.S. 57 (1972); *Tumey v. Ohio*, 273 U.S. 510 (1927); *cf. Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980). As noted above, decisions on remission and mitigation are made by the Director of the Office of Asset Forfeiture, a non-judicial official in the Criminal Division of the Department of Justice. *See* 28 C.F.R. § 9.3(d) (1991); United States Dep't of Justice, *Annual Report of the Department of Justice Asset Forfeiture Program* (1990) at 6, 13. Assets resulting from forfeitures are deposited in the Assets Forfeiture Fund, administered by the Department of Justice, and payments to innocent persons in connection with remission and mitigation are also made from this fund. *See* U.S. Br. at 38. This means that when the Director of the Office of Asset Forfeiture grants a remission petition the Fund is diminished, while a denial of remission preserves the Fund. Decisions of this type must be made by officials performing judicial functions in order to satisfy due process. *See Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980).

Because remission is purely a matter of administrative grace, decided by a prosecuting official not subject to judicial review, this procedure is insufficient to protect

a claimant's constitutional rights. *See, e.g., Connecticut v. Doehr*, —— U.S. ——, 111 S.Ct. 2105 (1991); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 248-49 (1980); *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *Fuentes v. Shevin*, 407 U.S. 67 (1972).

The interpretation of the relation-back doctrine urged by the United States vitiates the protection provided to innocent mortgage lenders and other bona fide purchasers by the civil forfeiture innocent owner provision. If the relation-back doctrine is applied in this fashion, mortgage lenders are virtually helpless to protect their liens from forfeiture. A mortgage lender can only hope to detect the illegal activity giving rise to the forfeiture prior to making the loan and then refuse to make the loan. It is unlikely that a lender will be able to detect the illegal activity giving rise to the forfeiture prior to making the loan, however, particularly when the activity giving rise to the forfeiture is the purchase of property with the proceeds of illegal activity. Under the interpretation of the relation-back doctrine urged by the United States, a mortgage lender lacks any effective way to protect its security interest in the property. Congress intended civil forfeiture innocent owner provisions such as 21 U.S.C. § 881(a)(6) to protect innocent mortgage lenders and similar bona fide purchasers for value in such circumstances.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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(4)

No. 91-781

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA,

Petitioner,

v.

A PARCEL OF LAND, BUILDINGS, APPURTENANCES AND IMPROVEMENTS KNOWN AS 92 BUENA VISTA AVENUE, RUMSON, NEW JERSEY, AND BETH ANN GOODWIN

Respondent.

On Writ of Certiorari To
The United States Court of Appeals
For The Third Circuit

BRIEF AMICUS CURIAE OF THE FEDERAL HOME LOAN MORTGAGE CORPORATION IN SUPPORT OF THE RESPONDENT BETH ANN GOODWIN

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QUESTION PRESENTED FOR REVIEW

Whether the relation-back provision of 21 U.S.C. § 881 divests an innocent owner, including a bona fide purchaser, of his/her interest in real property that is otherwise protected by the innocent owner defense.

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STATUTORY PROVISIONS

Section 511 of the Controlled Substances Act of 1970, 21 U.S.C. § 881(a)(6) provides:

The following shall be subject to forfeiture to the United States and no property right shall exist in them:

* * * * * * * * * *

(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of [21 U.S.C. 801-904], all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without knowledge or consent of that owner.

21 U.S.C. § 881(h) provides:

Vesting of title in United States

All right, title, and interest in property described in subsection (a) of this section shall vest in the United States upon commission of the act giving rise to forfeiture under this section.

INTRODUCTION

Congress acknowledged the long and effective history of forfeiture law when it resurrected this remedy as a means to combat crime. But, recognizing fundamental fairness, Congress drafted 21 U.S.C. § 881(a)(6) expressly to blunt the harsh and unfair sweep of the forfeiture law by protecting the interests of innocent owners. Congress meant this protection to be interpreted broadly, and intended Section 881(a)(6) to shield the interests of all innocent owners, including the innocent lender. Such protection is essential to the efficient functioning of the home lending industry. The bedrock of the mortgage industry is predictability—assurances of title that are traced backwards for decades; enforceable mortgages that look forward for an equal period of time. The government suggests that the Court read the relation-back provision virtually to nullify the innocent

owner defense. Such a reading would supplant predictability with uncertainty and jeopardize the interest of innocent lenders. This is not what Congress intended, and it is not wise public policy.

INTEREST OF THE AMICUS

The Federal Home Loan Mortgage Corporation ("Freddie Mac" or "FHLMC") is a corporate instrumentality of the United States, created by Congress in 1970.[1] FHLMC operates in the "secondary mortgage market"; that is, FHLMC does not originate home loans or service them. Rather, FHLMC and other secondary market investors purchase mortgages from banks, savings associations, and other lenders who originate the loans on the primary mortgage market. FHLMC, in turn, "packages" the mortgages and sells them to investors in the form of mortgage-backed securities which represent various interests in the packaged mortgages. The funds obtained by the sale of the securities flow back to the lenders when FHLMC purchases the mortgages. The lenders then have additional capital available to make home loans.

Congress created FHLMC to foster and promote a secondary mortgage market for the purchase and sale of mortgages on residential property. But the government's "take no prisoners" interpretation of Section 881 will impair FHLMC's ability to fulfill this mandate by needlessly creating uncertainty about the enforceability of home mortgages.

SUMMARY OF ARGUMENT

1. The Third Circuit's construction of 21 U.S.C. § 881(a)(6) and (h), making the relation-back doctrine inapplicable to property excepted from forfeiture under the innocent

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[1] Congress created FHLMC through the Emergency Home Finance Act of 1970, Pub. L. No. 91-351, 12 U.S.C. §§ 1451-59, as amended by Pub. L. No. 101-73, § 731 (1989).

owner defense, follows the plain language of the statute and is clearly supported by the legislative history.

2. The government's proposed interpretation of the statute forces an overlay of additional words onto the statute's plain language which was unintended by Congress. The government proposes to redefine the term "owner" and to alter the timing of when "knowledge and consent" should be examined. Both proposals will lead to arbitrary results wholly unsupported by the statute or legislative history.

3. While the legislative history demonstrates an intention to protect the interests of all innocent owners, at a minimum, Congress intended to safeguard the property interests of bona fide purchasers ("BFP"). The express legislative history of Section 881 and the legislative history of the corollary criminal provision both demonstrate this Congressional intent. Adoption of the government's position that no protection be afforded any after-acquired interest, even that of a BFP, would create the anomalous result that a BFP could demonstrate innocent ownership under the criminal, but not the civil, forfeiture statute. In addition, interpreting the statute so as to deprive BFPs of their property without even an opportunity to be heard is to create an unnecessary question regarding the constitutionality of the statute. Such an analysis should be avoided as a matter of accepted statutory construction and sound public policy.

4. The disposition of this case may well determine more than the validity of the Respondent's ability to demonstrate innocence. The mortgage industry is comprised of an interlocking system of lenders, secondary mortgage market entities (such as the Federal Home Loan Mortgage Corporation), securities investors, and individual homebuyers. The foundation of the industry is the stability and reliability of the enforceable home mortgage. The expansive reading of the relation-back clause sought by the government will undermine the enforceability of the home mortgage through no fault or oversight of the lender.

Lenders and other innocent owners will needlessly suffer losses without any commensurate benefit to the statutory purpose of fighting the war on drugs. Undesirable side effects, such as illegal discrimination in lending practices, could be fueled by lenders' apprehension of future losses. Ultimately, the American homebuyer will pay the price for this uncertainty. Such a result was expressly avoided through Congress' enactment of the innocent owner exception.

ARGUMENT

I. THE HOLDING OF THE COURT BELOW SHOULD BE AFFIRMED

A. The Third Circuit's Analysis Follows the Plain Language Of The Statute And The Legislative History

The Third Circuit in the case below interpreted 21 U.S.C. § 881 to give effect both to the relation-back provision of Section 881(h) while at the same time protecting innocent owners under Section 881(a)(6). *United States v. A Parcel of Land, Buildings, Appurtenances and Improvements, Known as 92 Buena Vista Avenue, Rumson, New Jersey and Beth Ann Goodwin*, 937 F.2d 98, *reh'g denied* (3d Cir. 1991) (hereinafter "*Buena Vista*"). The court reasoned that, since Section 881(h) expressly vests title to the United States in "property described in subsection (a)," and subsection (a) provides an exception for innocent owners, then the first inquiry must be whether the property is exempt from forfeiture due to the innocence of the owner. If so, then Section 881(h) does not apply to that owner's interest in the property. *Buena Vista*, 937 F.2d at 101-02.

The court noted that the plain language of the statute speaks only in terms of an "owner" and in no way limits the definition of this term. *Id.* at 101. Indeed, the court noted that Congress chose the broader term "owner" for the civil statute, and not the more restrictive "bona fide purchaser for value" wording used

in the criminal forfeiture statute. *Id.* at 102. Therefore, Congress adopted a broader scope of protection under Section 881.

A broad definition of "owner," which covers all entities with an interest in the property, is clearly supported by the case law. *See, e.g., United States v. One 56-Foot Motor Yacht Named Tahuna*, 702 F.2d 1276, 1279 (9th Cir. 1983). There, the government's argument that a subsequent purchaser of the yacht lacked "standing" to contest the forfeiture failed. "[O]ne who contests a forfeiture must be a claimant. A 'claimant' is one who claims to own the article or merchandise or to have an interest therein." (Citations omitted). *See also United States v. $321,470.00 U.S. Currency*, 874 F.2d 298, 303 (5th Cir. 1989) (reviewing the Joint Explanatory Statement of Titles II and III, Pub. L. No. 95-633, 95th Cong. 2d Sess., *reprinted in* 1978 U.S.C.C.A.N. 9496, 9518, 9522-23); *In Re Metmor Fin., Inc.*, 819 F.2d 446, 448 n. 2 (4th Cir. 1987); *United States v. Real Property Titled in Name of Shashin, Ltd.*, 680 F. Supp. 332, 334 (D. Haw. 1987).

In addition to recognizing the plain language of the statute, the Third Circuit also examined its earlier analysis of the legislative history behind the innocent owner exception. *Buena Vista*, 937 F.2d at 102, *citing* the remarks of Senators Nunn and Culver described in *United States v. Parcel of Real Property Known as 6109 Grubb Road*, 886 F.2d 618, 625, *reh'g denied en banc*, 890 F.2d 659 (3d Cir. 1989)("*Grubb Road*"). The court noted the remarks of Senator Culver, commenting on legislators' concerns about the overbreadth of one version of the statute.

> Specifically, it was noted that the original language could have been construed to reach properties traceable to the illegal proceeds but obtained by an innocent party without knowledge of the manner in which the proceeds were obtained. *The original language is modified in the proposed amendment in order to protect the individual who obtains ownership of proceeds with no knowledge of the illegal transaction.*

124 Cong. Rec. 23056 (daily ed. July 27, 1978) (emphasis added). This legislative history demonstrates unambiguously that the term "owner" was meant to be interpreted broadly and to afford protection to those who obtain ownership without knowledge of any illegality.

In the case below, the Third Circuit carefully reviewed both the express statutory language and the legislative history behind the statute. *Buena Vista*, 937 F.2d at 101-03. The Court's analysis is true to proper statutory construction and gives meaning to the unambiguous language of the statute. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). The analysis also allows the relation-back theory and the innocent owner defense of the statute to coexist without diminishing the effectiveness of the law. Innocent owners are protected, but drug dealers will not enjoy the fruits of their profession.

B. The Government's Proposed Analysis Is Strained And Unsupported By Either The Statutory Language Or The Legislative History

Judge Mansmann, writing for the court below, correctly identified the flaw in the government's position:

> . . . to interpret section 881(h) in the manner suggested by the government would essentially serve to emasculate the innocent owner defense provided for in section 881(a)(6). No one obtaining property after the occurrence of the drug transaction-including a bona fide purchase[r] for value—would be eligible to offer an innocent owner defense on his behalf.

Buena Vista, 937 F.2d at 102.

This was not the result intended by Congress. Section I. A., *supra*.

The government's proposed interpretation rests primarily on two assumptions:

(1) The word "owner" in § 881(a)(6) actually means an owner who acquired the property prior to the acts triggering forfeiture; and

(2) The "knowledge or consent" of the owner actually means knowledge or consent at the time the acts triggering forfeiture occurred.

Pet. Brief at 10-11.

Both assumptions require an unnatural and unsupportable reading of the statute, and will lead to results not intended by Congress.

1. Congress did not Intend the Term "Owner" to be Restricted by the Date of Acquisition

Congress intended that the word "owner" be given its plain meaning and that an owner's innocence, rather than the timing of the property's acquisition, be dispositive of the owner's rights. The government attempts to read Section 881 for the proposition that an owner's innocence is irrelevant if the interest in the property was acquired after the act triggering forfeiture. Pet. Brief at 21-23. Section I. A., *supra*. There is no legislative history and certainly no language in the statute to support this restrictive definition. Indeed, the government's reliance on *United States v. Stowell*, 133 U.S. 1 (1890) is misplaced for the very reason that Congress expressly rejected this harsh approach in 1978 and again when amending the statute in 1982 and 1984. In *Stowell*, the Court held that, when the property right vests in the United States, the vesting "avoids all intermediate sales and alienations, even to purchasers in good faith." *Id.* at 17. Had Congress intended to codify the *Stowell* result, it could have simply used the clear and oft-quoted language from that case. Instead, Congress chose to formulate an *express exception* to

this harsh result; that is, the innocent owner defense of Section 881(a)(6). The term "owner" is not qualified by the adjectives that the government presumes to insert, such as "original owner," "existing owner," or, borrowing language from *Stowell*, "owner at the time the offense is committed." *See, e.g.*, 133 U.S. at 17. In addition, Congress chose to refer to "the interest of *an* owner," rather than "*the*" owner, indicating that Congress did not mean to focus on a specific owner at a specific point in time.

The language of the statute also contemplates subsequent transferees in its use of the word "proceeds." As one court reasoned,

> . . . as "proceeds" under section 881(a)(6) necessarily bear the imprimatur of a *prior* illegal drug transaction, Congress' enactment of the innocent owner exception to that section serves to underscore the ability of a subsequent transferee, under certain circumstances, to obtain innocent owner status.

United States v. One Single Family Residence Located at 2901 S.W. 118th Court, Miami, Fla., 683 F. Supp. 783, 788 (S.D. Fla. 1988). Judge Murnaghan made a similar observation in his concurring opinion in *In Re One 1985 Nissan, 300 ZX*, 889 F.2d 1317, 1322 (4th Cir. 1989) ("How can one obtain drug deal proceeds before the transaction even takes place?") (J. Murnaghan, concurring).

In addition, had Congress intended Section 881(h) to dichotomize the treatment of property acquired before and after the triggering act, it could have done so simply by amending (a)(6). For example, Congress could have signalled this intent by drafting (a)(6) as " . . . except that no property, *other than after-acquired property*, shall be forfeited." However, Congress did *not* adopt such limiting language, and the government should not be permitted to rewrite the statute.

The codification of the relation-back doctrine in Section 881(h) was enacted as an uncontroversial recognition that relation-back applied to forfeitures under Section 881(a). There is no indication that Congress meant the provision as a repudiation of established law.

> . . . The Senate Report on the Comprehensive Crime Control Act of 1984 devotes thirty full pages to the forfeiture amendments contained in Title III of the Act. The amendment clarifying that relation back applies to section 881 is scarcely even mentioned in the Report because it was so insignificant and uncontroversial. The Report merely notes that the relation back principle is "well established in current law." If Congress intended to eviscerate or sharply curtail the innocent owner provision of section 881(a)(6) by enacting section 881(h), the provision would have been very important and the Senate Report would not have passed over it so quickly.

David B. Smith, *Prosecution and Defense of Forfeiture Cases*, ¶4.03[i], at 4-74 (1991).

In addition, repeals by implication are disfavored under the rules of statutory construction. Where there is no express intention to repeal, implied repeal is permissible only where the earlier and later statutes are irreconcilable. *Id.*, *citing Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 808 (1976)(*quoting Morton v. Mancari*, 417 U.S. 535, 550 (1974)). As the court below demonstrated, Sections 881(a) and 881(h) dovetail logically when read with their plain meaning.

Under the government's theory, the fortuity of the timing of ownership, rather than the merits of innocence, will determine which owners must bear an unexpected and undeserved loss. For example, an innocent owner who purchases property the day prior to the act causing forfeiture will be able to demonstrate innocence and recover his property. But his innocent but unlucky counterpart, purchasing the day *after* the act, will lose his entire investment. No benefit attaches to this aberrant result, and Congress did not intend such an anomaly.

2. An Owner's Standing to Demonstrate Innocence Should be Viewed at the Time the Property Is Acquired

The other assumption in the government's proposal is that the owner's ability to prove lack of knowledge or consent is viewed at the moment of the act triggering forfeiture, rather than at the time the property is acquired. Again, there is no legislative history or statutory language to support such a reading, and again, fortuity would reign. For example, in a case where a series of triggering acts occurred over a period of time, the act chosen to show probable cause would also determine whether an innocent owner is barred from recovering his property. The potential capriciousness of such a result is self-evident. It makes no sense, and certainly does not further the drug-fighting goal of the statute, to take a snapshot of the owner's knowledge when the act occurs. Rather, an owner's standing to seek an exception to forfeiture is viewed at the time the property is acquired, and the owner's innocence remains a factual inquiry.

The criminal statute, 21 U.S.C. § 853(c) speaks in terms of a "bona fide purchaser at the time of purchase." There is no reason to believe that Congress intended a totally different time frame to be invoked in Section 881(a)(6) and yet chose not to specify the change. It is far more likely that Congress intended the relevant time period to be when the property is acquired.[2]

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[2] The government weaves an entangled web in its example at Pet. Brief 10-11. The government describes an "absurd result" that occurs when an owner claims innocence because he had no knowledge of illegality *at the time of the act*, but subsequently learned of the taint prior to acquisition. The government concludes that the only resolution is to bar claims by all "after-acquired" innocent owners. *Id.* However, the absurdity is created only by the government's convoluted reading of (a)(6). The "absurd result" never occurs if the statute is read plainly—that the court examines knowledge or

The government's argument that "owner" implicitly carves out after-acquired property, as well as the government's interlineation into the statute that "knowledge" means "at the time of the act," are unsupported, unnecessary and could lead to unintended results. If one reads the statute plainly, as did the court below, "owner" maintains its common meaning and protects owners who can demonstrate innocence. The court will judge the owner's state of mind at the time of acquisition by examining "knowledge or consent." The goal of the statute will obtain, with malfeasants penalized and innocent owners spared.

C. At A Minimum, Section 881 Provides For The Rights Of A Bona Fide Purchaser

The legislative history of the innocent owner exception demonstrates the intention that the term "owner" should be interpreted broadly to afford protection for all innocent owners. *See* Section I. A., *supra*. But, *at a minimum*, Congress intended the property interests of a BFP to be protected.[3]

The legislative history of Section 881(a)(6) specifically addresses the BFP issue:

> . . . at the request of Senator Mathias and Senator Wallop's staff, we did add a provision in the modification to make it clear that *a bona fide party who has no knowledge or consent* to the property he owns having been derived from an illegal transaction, that party would be able to establish that fact under this amendment and forfeiture would not occur.
>
> That is the purpose of the wording added to the modification, in addition to some other wording in the modification making the amendment broader than it otherwise would have been.

124 Cong. Rec. 23057 (daily ed. July 27, 1978)(statement of Senator Nunn)(emphasis added).

The very words used by Senator Nunn, "no knowledge or consent," form the innocent owner exception to (a)(6). The court in *United States v. One Single Family Residence Located at 6960 Miraflores Avenue, Coral Gables, Fla.*, 731 F. Supp. 1563 (S.D. Fla. 1990), directly rejected the government's argument (argued again in this case) that the innocent owner exception applies only to claimants who owned the property at the time of the offense. Reviewing Senator Nunn's remarks, the court held:

> Thus, Congress believed that the innocent owner exception would protect bona fide purchasers who acquired ownership of the property subsequent to the offense giving rise to the forfeiture. The Government's position to the contrary is simply not supported by the legislative history of the statute.

Miraflores, 731 F. Supp. at 1568.

Similarly, the court in *United States v. One Single Family Residence Located at 2901 S.W. 118th Court, Miami, Fla.*, 683 F. Supp. 783 (S.D. Fla. 1988) rejected the government's argument that the codification of relation-back necessarily precludes a BFP from being an innocent owner under Sections 881(a)(6) and (a)(7). The court observed that "section 853(c) of the

---

consent at the time the property is acquired. Any party who acquires real property knowing it constitutes drug proceeds would be unable to claim innocent ownership because he would have learned the status of the property prior to obtaining an ownership interest. Thus, the government's fear of an absurd result is unpersuasive, as a plain reading of the statute would preclude this scenario.

[3] There is no dispute that a mortgagee or other lienholder can qualify as an innocent owner under section 881(a). See, e.g., *United States v. One Urban Lot Located at 1 Street A-1, Valparaiso, Bayamon, P.R.*, 865 F.2d 427, 430 (1st Cir. 1989); *In Re Metmor Fin., Inc.*, 819 F.2d 446, 448 n. 2 (4th Cir. 1987). *See* David F.B. Smith, *Mortgage Lenders Beware: The Threat To Real Estate Financing Caused By Flawed Protection For Mortgage Lenders In Federal Forfeiture Actions Involving Real Property*, 25 Real Property, Probate and Trust Journal 481, 499 n. 45 (Fall 1990).

criminal forfeiture statute . . . codified *both* the relation back doctrine and the bona fi[d]e purchaser exception." *Id.* at 787. Thus, the two provisions need not be mutually exclusive. The district court below also found this reasoning persuasive and noted that it is accepted practice in fraudulent conveyance law and under the uniform commercial code to make an exception for a BFP, but not for other transferees. *United States v. A Parcel Of Land, Buildings, Appurtenances and Improvements, Known as 92 Buena Vista Avenue, Rumson, New Jersey*, 738 F. Supp. 854, 861 (D.N.J. 1990). Therefore, it would not be an unusual exception to include in a forfeiture statute.

It is noteworthy that neither of the circuit court cases relied upon by the government addressed the issue of a BFP. *See Eggleston v. Colorado*, 873 F.2d 242 (10th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990); *In Re One 1985 Nissan, 300 ZX*, 889 F.2d 1317 (4th Cir. 1989). In *Nissan*, the Fourth Circuit specifically noted that it was not considering a BFP situation. *Nissan*, 889 F.2d at 1321 n. 4. Moreover, the concurring opinion in that case argued forcefully for a BFP exception to relation-back: "It seems manifestly unfair to penalize an innocent person who has provided something of value in exchange for property that, unbeknownst to him, had been used in or derived from drug trafficking." *Nissan*, 889 F.2d at 1322 (J. Murnaghan, concurring, joined by C. J. Ervin and J. Phillips).

The legislative history of the relation-back provision of the Racketeering Influenced and Corrupt Organizations (RICO) statute, 18 U.S.C. § 1963(c) (Supp. V 1987), and the contemporaneous passage of Section 881(h) also are instructive:

> In codifying the relation-back doctrine in subsection 881(h), Congress incorporated the concurrent legislative history of the RICO statute. Importantly, this history explicitly states that the relation-back doctrine "should not operate to the detriment of innocent *bona fide purchasers* of the defendant's property . . . [and]

> that this provision may not result in the forfeiture of property *acquired by an innocent bona fide purchaser*." Consequently, despite Congress's failure expressly to codify these protections under subsection 881(h), the evidence suggests that, as with subsections 881(a)(6) and (7), the operation of an implied bona fide innocent-purchaser exception was hardly outside legislative consideration.

Mark A. Jankowski, *Tempering the Relation-Back Doctrine: A More Reasonable Approach To Civil Forfeitures In Drug Cases*, 76 Va. L. Rev. 165, 185 (1990).

The juxtaposition of Section 881 and the criminal forfeiture provision (which expressly provides for the BFP) highlights another anomalous result of the government's interpretation. That is, a BFP would avoid forfeiture under the criminal forfeiture statute, but would not even have an *opportunity* to prove its innocence in the civil forfeiture proceeding. It was not the intent of Congress to have the arbitrary choice of proceeding, civil or criminal, predetermine the *result* of the BFP's interest. The innocent owner provision avoids this nonsensical outcome.

In addition, under the government's reading, a BFP can be divested of its property without any hearing whatsoever, and without regard to the owner's innocence. Precluding innocent owners from having an opportunity to be heard raises fundamental issues of constitutionality which Congress meant to avoid through the innocent owner exception. This Court has suggested that such an unforgiving statute would be unconstitutional:

> [I]t would be difficult to reject the constitutional claim of an owner whose property subjected to forfeiture had been taken from him without his privity or consent, . . . Similarly, the same might be said of an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent

> the proscribed use of his property: for in that circumstance, it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive.

Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 689-90, *reh'g denied*, 417 U.S. 977 (1974). Several courts have reasoned that the government's interpretation would be violative of due process. *See e.g., United States v. One Single Family Residence Located at 6960 Miraflores Avenue, Coral Gables, Fla.*, 731 F. Supp. 1563, 1569 (S.D. Fla. 1990); *6109 Grubb Road*, 886 F.2d at 622; *Monroe Savings Bank, FSB v. Catalano*, 733 F. Supp. 595, 598-99 (W.D.N.Y. 1990). Moreover, the government's reading of Section 881 would violate a cardinal principle of statutory construction; that is, to read the statute so as to *avoid* potential constitutional defects. *N.L.R.B. v. The Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979). The government's proposed reading here *creates* a constitutional defect.

The government's position also raises the question of whether such a "take-all" reading of the relation-back provision would violate the proportionality standard of the Eighth Amendment. The wrongdoer's violation would wipe out all interests of all after-acquiring owners, irrespective of their innocence and no matter how disproportionate the penalty is to the circumstances. The Eighth Amendment has been held not to apply in civil proceedings. *See, e.g., United States v. Tax Lot 1500, Township 38 South, Range 2 East, Section 127, Further Identified as 300 Cove Road, Ashland, Jackson Co., Ore.*, 861 F.2d 232 (9th Cir. 1988), *cert. denied sub nom. Jaffe v. United States*, 493 U.S. 954 (1989). However, recent Supreme Court cases suggest that the Eighth Amendment could apply to certain civil forfeitures. *See Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989). *See generally* David F. B. Smith, *Mortgage Lenders Beware: The Threat To Real Estate Financing Caused*

By Flawed Protection For Mortgage Lenders In Federal Forfeiture Actions Involving Real Property, 25 Real Property, Probate and Trust Journal 481, 495-98 (Fall 1990). This Court's opinion in *Stowell*, more than a century ago, suggested that the proportionality of the forfeiture should be considered. The Court compared two forfeiture statutes and reasoned:

> . . . But it is hard to believe that congress intended that a forfeiture of real estate, under this section, for not keeping books, should be more comprehensive than the like forfeiture, under the leading section already considered for the graver offense of carrying on the business of a distiller without having given bond.

United States v. Stowell, 133 U.S. 1, 16 (1890).

The Court continued that the more reasonable reading was to allow the forfeiture of personalty, ". . . but, as to the real estate, to forfeit only the right, title, and interest of the distiller, and of any persons who participate in or consent to the carrying on of the distillery." *Id.* It would be unfair and a disproportionate penalty to interpret Section 881 in a way that would forfeit, without any constitutional due process, not only the wrongdoer's interest in the property, but the interests of all BFPs as well.

Decidedly, there is the overriding concern of fairness. In a statute whose purpose is to "strik[e] at profits from illicit drug trafficking," 124 Cong. Rec. 23056 (daily ed. July 27, 1978)(statement of Sen. Culver), it does nothing to advance the purpose of the law by forcing losses on BFPs. The only possible "benefit" would be to supplement the coffers of the United States to fund the war on drugs. But it is unjust to extract such funding from innocent owners. *See, e.g., Metmor*, 819 F.2d at 450 n. 7 (the government's retention of post-seizure interest and expenses could only be to "boost the federal treasury"). *See also United States v. Four Parcels of Real Property on Lake Forrest*

Circle in Riverchase, Shelby County, Ala., 870 F.2d 586, 590 n. 11, 591 n. 12, 594 (11th Cir. 1989).[4]

II. THE GOVERNMENT'S "TAKE ALL" INTERPRETATION OF THE RELATION-BACK PROVISION WOULD SERIOUSLY UNDERMINE THE CERTAINTY NECESSARY TO THE MORTGAGE INDUSTRY

The mortgage industry would bear the fallout from the government's unsupportable reading of Section 881. But those ultimately hurt will be the nation's homebuyers.

FHLMC's corporate mission was set forth by Congress:

> It is the purpose of the Federal Home Loan Mortgage Corporation—
>
> (1) to provide *stability* in the secondary market for home mortgages;

[4] The government asserts that "truly blameless parties," Pet. Brief at 12, may be able to avoid forfeiture of their properties because of the administrative procedures of the Attorney General, and therefore, that bona fide purchasers should not be concerned about the interpretation of the statute. Pet. Brief at 37-39. First, such procedures cannot justify an unintended reading of the statute. Second, the procedures do not provide the necessary safeguards for innocent owners, including BFPs. These regulations are unenforceable, *United States v. Caceres*, 440 U.S. 741, 753 (1979), and provide no substitute for legal rights.

Any remission lies within the sole discretion of the Attorney General and is essentially an unreviewable decision. *See Grubb Road*, 886 F.2d at 625. A conflict of interest can arise in that the government, as reviewing party, will be the one to benefit economically from the denial of a claim. Further, the standard of proof under the administrative procedures is more stringent than set forth in the statute. The administrative procedures require a showing that the owner took "all reasonable steps" to prevent an illegal use rather than proof of no "knowledge or consent," thus imposing a greater burden on the owner. Calculations of any accepted claim are made according to the administrative procedures and do not afford full consideration of certain costs, attorneys' fees and interest that the owner may otherwise be able to recover. *See, e.g., Metmor*, 819 F.2d 446, 448, 448 n. 3. Finally, the procedures, as well as the U.S. Dept. of Justice, *Expedited Forfeiture Settlement Policy For Mortgage Holders* (April 1992) can and have been amended by the Attorney General's office in its sole discretion and without notice.

> (2) to respond appropriately to the private capital market; and
>
> (3) to *provide ongoing assistance* to the secondary market for home mortgages (including mortgages securing housing for low- and moderate-income families involving a reasonable economic return to the Corporation) by increasing the liquidity of mortgage investments and *improving the distribution of investment capital* available for home mortgage financing.

12 U.S.C. § 1451(b), as amended by Pub. L. No. 101-73, § 731 (1989) (emphasis added).

FHLMC, by statute, may only purchase residential mortgages, and the dollar amount of each single-family loan it can purchase is capped each year.[5] Federal Home Loan Mortgage Corporation 1991 Annual Report at 9. ("Annual Report"). As a result, FHLMC focuses on the middle class homebuyer. Approximately eighty-four percent of FHLMC's total servicing portfolio consists of fixed-rate mortgages on single family homes. Annual Report at 2. This is where Congress intended FHLMC's strength to be—in providing assistance to the American homebuyer.

The volume of FHLMC's business demonstrates the wide and detrimental sweep of the government's proposed relation-back reading. During 1991, FHLMC purchased $100 billion in mortgages.[6] Obviously, with such a huge volume, FHLMC

[5] In 1991, that cap was $191,250. For 1992, it is $202,300.

[6] Purchase transactions can be as small as one mortgage or as large as a record one-time purchase of 72,000 loans.

cannot and does not individually review each of the mortgages prior to purchase.[7] However, a post-funding quality control review is performed by FHLMC on a certain percentage of all loans purchased.

Similarly, FHLMC does not itself "service" the mortgages it buys.[8] But, as with the selling of loans, FHLMC provides detailed instructions to its 4,082 servicers across the country to ensure consistency and quality in loan servicing. FHLMC oversees this servicing, administering over five million active loans in each monthly servicing cycle. Video Presentation, "The Back Office," FHLMC Board of Directors Meeting (June 7, 1991).

The destination of the overwhelming proportion of loans purchased by FHLMC is the same. Ninety-five percent of FHLMC loans are "securitized" that is, converted into securities. *Id.*

FHLMC is a large player in the mortgage industry.[9] Since its creation in 1970, FHLMC has provided financing for one in eight American homes, including more than 700,000 apartment units. Annual Report at 10. In 1991, FHLMC and other secondary market lenders purchased more than $400 billion of home mortgages. *Id.* at 13. Approximately one of every two conventional mortgages originated by lenders is sold into the secondary market. *Id.* at 7. Keeping this system operating smoothly and

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[7] Although FHLMC does not "make" loans to home buyers, it formulates standards for such origination. These standards are set forth in detail in the two volume Sellers' and Servicers' Guide published by FHLMC, and other contractual documents. They include rigorous underwriting criteria, such as loan-to-value ratio restrictions, the size of the minimum downpayment, and credit and employment documentation.

[8] "Servicing" includes collecting and accounting for monthly principal and interest payments, conducting property inspections when necessary and contacting the borrower in cases of non-payment or other problems.

[9] FHLMC is a stockholder-owned corporation, ranked 85th in size by Standard and Poors 500.

with rapid turn-around accomplishes two important goals: 1) reallocation of funds from areas of excess capital to geographical areas where funds for housing are in short supply, and 2) lowering interest rates.[10]

This network of mortgage purchases is dependent upon the stability of residential property and the validity and enforceability of the lender's security interest in that property. Therefore, to interpret the relation-back theory as one that "trumps" a valid mortgage—no matter the innocence of the owner—threatens to undercut the stability of this network. If Section 881(a) is interpreted in the manner advocated by the government, even the most responsible lender, exercising proper due diligence and thorough underwriting, could not ensure that its mortgage will be enforceable. Even the most cautious secondary market entity will be uncertain that the mortgage securing the loan is worthy of reliance. And the securities investors, despite certain investment guarantees, may also question the dependability of the underlying collateral.

One result of this uncertainty may be more litigation. The government's proposition that the innocence of the owner is irrelevant in a relation-back context means that an entire group of commercial entities, acting without any knowledge of or consent to a wrongdoing, must bear a loss initiated by the government. Although there will be no "fault" to assess, someone will have to bear the loss. Secondary market players will seek to enforce the warranties made by the primary lender who may, in turn, seek to pass the loss on to others.[11] Securities

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[10] On average, interest rates on mortgages that qualify for sale to FHLMC are about one half of one percent lower than on non-conforming mortgages. Annual Report at 7.

[11] For example, the primary lender may attempt to sue the title insurer. It is unresolved whether forfeiture can trigger a loss provision under a standard title insurance policy. *See United States v. One Parcel of Real Estate, Located on Fellows Tracts C, D, E, and F of Pine Island Estates*, 715

investors, too, may attempt to recover their losses, if any, through litigation.

The American homebuyer will ultimately pay for these losses because the costs will be "priced" into the system. Higher interest rates, decreased access to mortgage funds and perhaps longer delays prior to funding will be borne by the consumer.

Unrestricted relation-back could have other unwanted side effects. For example, lenders may be chilled to report to law enforcement agencies information about drug activity learned after the loan was made for fear it could result in a loss of the entire lien. Such losses may even inadvertently encourage discrimination in lending. Without any opportunity to demonstrate innocent ownership, lenders may refuse to lend their mortgage funds in certain areas; for example, urban centers, low-income areas, neighborhoods known for illicit drugs, or apartment buildings where there is a risk that one wrongdoing tenant could jeopardize the entire collateral. Lenders may be reluctant to accept mortgages from homebuyers with latin sur-names or those who are recent immigrants, suspicious that these borrowers might fit "drug profiles."[12] How ironic that FHLMC's Congressional purpose of providing stability and assistance for home mortgages (including low income housing) and improved distribution of investment capital should be impaired by an overreaching interpretation of another laudable Congressional goal—the eradication of illegal drugs.

F. Supp 360, 363 (S.D. Fla. 1989)(Congress did not intend to "disrupt state regulation of land transfers" or to "place all land titles in doubt because of the 'relation-back'" doctrine).

[12] FHLMC's continuous commitment to its Affordable Housing Program and efforts to work with lenders in uncovering practices that may unintentionally discriminate could thus be undercut by an unforgiving relation-back doctrine.

The irony is compounded by the fact that the secondary mortgage market and the government share mutual goals. Entities such as FHLMC strive hard to purchase only investment quality loans—mortgages tainted with drug money are not only bad policy, they are a bad risk. Thus, a Draconian reading of the relation-back provision of Section 881, in which entities like FHLMC lose all, will not enhance compliance; it will simply cause the loss to be borne by innocent owners. Such a result was not intended by Congress. Indeed, it impairs Congress' goal of broadening home ownership, but does nothing to advance the fight against illegal drugs.

CONCLUSION

It is indisputable that drug dealers should not be allowed to profit from their illegal trade. But the government's desire for an expansive reading of Section 881 is a view of the trees without the forest. Other owners, truly innocent owners, will bear an unnecessary hardship if Section 881 is read to automatically extinguish all interests acquired after the illegal act.

The government's interpretation of the statute would needlessly force unexpected losses of mortgages on an industry built on certainty. The losses would be borne by innocent owners who would not even have the opportunity to demonstrate their innocence. The cost of these losses will be passed on to the American home buyer. Such a result is unfair, unintended, and perhaps unconstitutional.

For the foregoing reasons, FHLMC as amicus curiae respectfully urges this Court to affirm the decision of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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June, 1992

No. 91-781

In The

Supreme Court of the United States

October Term, 1991

UNITED STATES OF AMERICA,

Petitioner,

v.

A PARCEL OF LAND, BUILDINGS, APPURTENANCES AND IMPROVEMENTS KNOWN AS 92 BUENA VISTA AVENUE, RUMSON, NEW JERSEY, AND BETH ANN GOODWIN,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF THE DADE COUNTY TAX COLLECTOR, THE DADE COUNTY PROPERTY APPRAISER, AND DADE COUNTY AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

WHETHER, IN A CIVIL FORFEITURE PURSUANT TO SECTION 881 OF TITLE 21, AN INNOCENT OWNER'S INTEREST CAN ARISE AFTER THE DATE OF THE CRIMINAL ACT ON WHICH THE FORFEITURE IS BASED?

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BRIEF OF THE DADE COUNTY TAX COLLECTOR, THE DADE COUNTY PROPERTY APPRAISER, AND DADE COUNTY AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTERESTS OF THE *AMICI CURIAE*

While not taking a position on the outcome of the particular dispute presented by the facts of this case, the Dade County Tax Collector, the Dade County Property Appraiser, and Dade County respectfully request this Court not to adopt the broad, overreaching interpretation of the relation back doctrine urged by the federal

government.[1] The federal government's interpretation would cause severe and unnecessary harm not only to Dade County but to all state and local governments and schoolboards in the United States that rely upon real estate taxes for revenue.

In its brief, the federal government urges this court to adopt the broad principle that an innocent owner's interest can *never* arise *after* the date of the criminal act on which the forfeiture is based. *See, e.g.*, U.S. Initial Brief at 5, 25, 29. The federal government blithely reassures this Court that such an interpretation "will not result in the confiscation of property in the hands of truly blameless parties." *Id.* at 12.

To the contrary, however, the federal government is already using its broad interpretation of the relation back doctrine in a nation-wide campaign to forfeit the real property tax liens of "truly blameless parties" – namely state and local governments and schoolboards. In all of its forfeiture actions nationwide, the federal government maintains that the relation back doctrine requires it to forfeit the drug trafficker's property *and* all state, county, city, and school board real property tax liens that attached to the property after the date of the criminal act giving rise to the forfeiture. Office of Legal Counsel, U.S. Department of Justice, *Liability of the United States For State and Local Taxes On Seized and Forfeiture Property* (July 9, 1991) (attached as appendix A).

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[1] The parties' letter of consent have been filed with the Clerk pursuant to Rule 37.3 of this Court.

In one recent case, for example, the federal government brought a forfeiture action in 1991, alleging that a parcel of real estate had been purchased with drug proceeds in 1982, and was therefore immune from state and local taxes *as of 1982. United States of America v. All That Tract Or Parcel Of Land Commonly Known As 2350 N.W. 187 Street, Miami, Florida*, No. 1:91-cv-247-RHH (N.D. Ga. Nov. 13, 1991) Slip op. at 8, 10, 14, *appeal pending*, Case No 91-9110 (11th Cir.). The federal government maintains that the relation back doctrine makes a property immune from state taxation, even if the taxes were paid by someone other than the federal government and even if the federal government itself leases the property to private individuals for private use after the date of the seizure. *United States v. A Single Family Residence Located At 3181 S.W. 138th Place, Miami, Florida*, 778 F. Supp. 1570, 1575 (S.D.Fla. 1991), *appeal pending*, Case No. 91-6126 (11th Cir.). Under its interpretation, the federal government could force state and local governments to turn over to it real estate taxes that the local governments had collected and spent years before the forfeiture action was ever filed.[2]

The federal government has announced that the Attorney General's discretionary power to grant remission pursuant to 28 U.S.C. section 524 is not available under any circumstances to pay state and local real property tax liens that accrue after the date of the illegal act

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[2] Already, when the federal government uses the relation back doctrine to forfeit the liens of innocent purchasers of state tax certificates, the federal government advises the tax certificate holders to obtain refunds from the state. *See, e.g.*, Letter U.S. Attorney Lehtinen to Adelman (attached as appendix B).

giving rise to the forfeiture: "the Attorney General's authority to grant remission of forfeiture is insufficient to permit payment of tax liens attaching after the relevant offense, for such relief can only be granted if the petitioner 'has a valid, good faith interest in the seized property as owner or otherwise.' " *Office of Legal Counsel Memo.*, at App. A-7.

The federal government's interpretation disrupts the Florida law of taxation and real property. Basically, state tax liens are treated under state law like federal tax liens are treated under federal law: once a tax lien attaches, the government "has an interest in the property and becomes in a sense a co-owner of it to the extent of the lien." *Welsh v. United States*, 220 F.2d 200, 203 (D.C. Cir. 1955). *See, e.g., United States v. Metropolitan Life Ins. Co.*, 256 F.2d 17, 25 (4th Cir. 1958). Florida law provides state tax liens with the highest priority: "All taxes imposed pursuant to the State Constitution and laws of this state shall be a first lien, superior to all other liens, on any property against which the taxes have been assessed . . . " Section 197.122, Fla. Stat. This lien arises as of January 1st of the tax year. *Id.* After attaching to the property, the tax lien constitutes a property interest held by the State "superior to all other liens or property interests" and "[a]ny and all vested rights, whether the interest be fee-simple or that of a mortgagee, vested remainderman or lessee for a term, must yield to the sovereign taxing power. . . . " *Riviera Club v. Belle Mead Dev. Corp.*, 194 So. 783, 785 (Fla. 1939).

Moreover, the federal government's contention disrupts the budgetary process of Florida. Florida law requires local governments to first determine the tax roll, then determine their budgets, and then to adjust their

millage rates to assure that the taxes collected are sufficient to meet budgeted needs. *See, e.g., Board of County Commissioners of Marion County v. Mckeever*, 436 So.2d 299, 301 (Fla. 4th DCA 1983). The federal government's interpretation of the relation back doctrine disrupts the State budgetary process by removing properties from the tax roll *years after* the State, counties, and schoolboards have calculated their budgets based on the reasonable belief that those properties would remain on the tax roll. In *2350 N.W. 187 Street, supra*, for example, there was no way for local governments to know at the time they taxed the property in 1982, 1983, or 1984, that the federal government would bring a forfeiture action in 1991 seeking to remove the property from the tax roll as of 1982. In the long run, the federal government's interpretation could undermine the balanced budget provisions of state constitutions.

In the current hard fiscal times, the federal government's policy of forfeiting state tax liens is hitting state and local governments where it hurts. Dade County, Florida alone is threatened with the loss of over $756,226.79 in actual tax dollar revenues for unpaid real estate tax liens that accrued on property prior to any final judgment of forfeiture. *See* Motion For Judicial Notice, Case No. 91-9110 (11th Cir. Feb. 26, 1992) (containing copies of the 92 claims filed by Dade County in federal forfeiture actions as of February, 1992). If this number is projected out over the thousands of counties in the Nation, it is apparent that the negative fiscal impact on local governments and schoolboards is massive.

Nor is the federal government's seizure of state and local tax liens justified by the federal government's sharing of forfeiture proceeds with local governments. By law,

that shared revenue is dedicated to law enforcement only. It is no comfort to a schoolboard, for example, that when its tax liens are forfeited, a portion is given to the local police department. As a matter of federalism and comity, it is for the state and local governments, not the federal government, to decide if the state and local real estate taxes should be used to hire a school teacher rather than a policeman.

SUMMARY OF ARGUMENT

This Court should reject the federal government's interpretation of the relation back and innocent owner provisions of the civil forfeiture laws that the innocent owner exception *never* applies to owners whose interests vest *after* the date of the illegal act giving rise to the forfeiture. U.S. Initial Brief at 14. It is false for the federal government to state that its interpretation "will not result in the confiscation of property in the hands of truly blameless parties." U.S. Initial Brief at 12. The federal government's contention inevitably leads to the forfeiture of the property interests of many innocent owners.

In fact, the federal government's interpretation is already at the heart of its current campaign to forfeit the real property tax liens of state and local governments and schoolboards that accrued on property targeted for forfeiture after the date of the illegal act. *See Office of Legal Counsel Memo.* (attached as appendix A). State and local governments and schoolboards were not the intended targets of the drug forfeiture laws. The Court should reject the federal government's interpretation which leads

to the absurd and unintended result of treating state and local governments as if they were the enemies in the war on drugs.

The federal government's theory is also contrary to the clear language of the statute. Section 881(h) of Title 21, known as the relation back provision, states: "All right, title, and interest in property described in subsection (a) of this section shall vest in the United States upon commission of the act giving rise to the forfeiture under this section." At first glance, this language appears to support the federal government's interpretation. To determine exactly what property is subject to subsection 881(h), however, it becomes necessary to examine subsection 881(a).

A review of subsection (a) reveals the fallacy of the federal government's position because subsection (a) specifically excludes from its ambit the property of an innocent owner. For example, subsection (a)(6), in describing the types of drug proceeds that are subject to forfeiture, states: "no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner." Section 881(a) of Title 21. "Reading subsection (h) of section 881 in tandem with subsection (a), it becomes clear that the 'right, title, and interest' that vests in the United States upon commission of the unlawful act comprises only so much of the property as is 'subject to forfeiture' under the appropriate division of subsection (a). The words of 881(a) . . . do not support the government's assertion that the innocent owner's interest amounts to whatever is left over after

the government has effected the forfeiture." *United States v. One Single Family Residence With Out Buildings Located at 15621 S.W. 209th Ave.*, 894 F.2d 1511, 1516 (11th Cir. 1990).

The idea that an innocent owner's interest can never arise after the criminal act is at odds with the language of section 881(a)(6) which recognizes an innocent owner's interest in the "proceeds" of drug transactions. As three Fourth Circuit judges stated in concurring to an en banc decision, "[the federal government's] interpretation would seem impossible to square with the plain language of section 881(a)(6) which expressly encompasses *'proceeds traceable to . . . an exchange'* of controlled substances. How can one obtain drug deal proceeds before the transaction even takes place?" *In the case of One 1985 Nissan, 300ZX*, 889 F.2d 1317, 1322 (4th Cir 1989) (Murnaghan, J., Ervin, C.J., Phillips, J. concurring). In the legislative history, Senator Nunn, among others, stated that an innocent owner would have a protectable interest even in property "derived from an illegal transaction." *See infra*, at 16. For the federal government to be correct, Senator Nunn must have completed misunderstood the amendment he was sponsoring.

To agree with the federal government, the Court must hold that the term innocent "owner," as used in the civil forfeiture provision of section 881, is narrower than, and does not even encompass, "bona fide purchasers," the term used in the criminal forfeiture provisions of section 853. But the term "bona fide purchaser" obviously represents a sub-class of the broader category "innocent owner:" "bona fide purchasers" are only one example of

the many possible types of "innocent owners." The federal government's interpretation distorts the plain meanings of these words. It also is in direct conflict with the cases and authorities providing innocent owner status in civil forfeitures to bona fide purchasers who obtain their interest after the illegal act. *See, e.g., United States v. One Single Family Residence*, 731 F. Supp. 1563, 1569 (S.D. Fla. 1990).

If the Court were to accept the federal government's contention, innocent owners have *more* protections under the criminal forfeiture provisions, which the federal government maintains protects bona fide purchasers, than under the civil forfeiture provisions, which the federal government maintains do not protect bona fide purchasers. This interpretation leads to the absurd result that property that is exempt from criminal forfeiture by virtue of a transfer to a bona fide purchaser would still be subject to civil forfeiture. Thus, under the federal government's interpretation, protections for innocent owners established in the criminal forfeiture provision could be avoided by bringing a separate civil forfeiture action. The federal government's interpretation has Congress protecting the bona fide purchaser's interest with one hand and grabbing that interest with the other hand.

Indeed, the accepted interpretation of a similar innocent owner provision of another forfeiture law is at odds with the interpretation advanced by the federal government in this case. *See, Florida Dealers and Growers Bank v. United States*, 279 F.2d 673, 677 (5th Cir. 1960) ("As we read it, this language [protecting innocent owners] may include an interest acquired by an innocent person *after illegal use.*") (emphasis added).

Finally, the federal forfeiture laws would be unconstitutional if they meant what the federal government says they mean. In *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 689-90, 94 S.Ct. 2080, 2094-95, 40 L.Ed.2d 452 (1974), this Court stated a forfeiture statute would be unconstitutional if it did not make an exception for an innocent owner "who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property." The import of *Calero-Toledo* is that truly innocent parties cannot be subject to forfeiture. Yet the federal government would have the Court adopt an interpretation that allowed that result.

In the final analysis, the dual purposes of the drug forfeiture laws are (1) to break the economic back of drug traffickers, and (2) to protect innocent parties from the harsh results of forfeiture. Both of these Congressional purposes would be served by interpreting the innocent owner and relation back provisions together to mean that subsequent transfers are voidable when they are voluntarily made by the drug trafficker in order to fraudulently hide assets from forfeiture. Certainly, there is no reason to interpret the relation back doctrine to forfeit state and local real estate tax liens that arose after the date of the illegal act but before the date of the final judgment of forfeiture. For these reasons, the federal government's overreaching, harsh, and draconian interpretation of section 881, which would result in the forfeiture of state and local real estate tax liens, should not be adopted by this Court.

ARGUMENT

STATE AND LOCAL GOVERNMENTS AND SCHOOL-BOARDS WHOSE REAL PROPERTY TAX LIENS ARISE AFTER THE DATE OF THE ILLEGAL ACT ON WHICH THE FORFEITURE IS BASED CAN BE STATUTORY INNOCENT OWNERS UNDER 21 U.S.C. SECTION 881(a)(6).

(1) Section 881(a) Specifically Excludes From Forfeiture And From The Relation Back Doctrine The Property Of An Innocent Owner.

In its brief, the federal government argues that "only persons who owned the property before commission of the illegal acts giving rise to forfeiture can avail themselves of the innocent owner defense." U.S. Brief at 11. This conclusion results from the federal government's contention that the relation back doctrine must be applied to the property interest of the drug dealer *and* the property interest of the innocent owner. U.S. Brief at 11, 28-29. But the federal government misreads the statute. Contrary to the federal government's contention, both the Third Circuit and the Eleventh Circuit held that Congress wrote the civil forfeiture statute in such a way to insure that the relation back doctrine would not be applied to forfeit the property interest held by innocent owners.

Section 881(h), known as the relation back provision, provides: "All right, title, and interest in property described in subsection (a) of this section shall vest in the United States upon commission of the act giving rise to the forfeiture under this section." At first glance, this language appears to support the federal government's interpretation. To determine exactly what property is subject to subsection (h), however, it becomes necessary to

examine subsection (a). Here, the federal government's position breaks down because subsection (a) specifically excludes from its ambit the property of an innocent owner. For example, subsection (a)(6), which concerns the proceeds of drug transactions reads:

> (a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:
>
> * * *
>
> (6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange . . . *except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.*

Section 881(a) of Title 21 (emphasis added). Under this language, the property that is described as being subject to forfeiture specifically excludes the property interest of an innocent owner.

In this regard, the Third Circuit properly held that *the relation back doctrine simply does not apply to the interest of an innocent owner.* The Third Circuit explained:

> We disagree with [the relation back analysis of the federal government]. Again we must read the plain language of the statute as Congress must have intended it by the words and structure it carefully chose. Section 881(h) vests title in the United States *in that property described in subsection (a).* Subsection (a) sets forth that property which is subject to forfeiture and it also provides for "innocent owner" defenses. Consequently, the property referred to in subsection (a) does *not* include property that has been exempted from forfeiture by means of an innocent owner defense. Logically then one must first ascertain whether the property at issue is not forfeitable because of an innocent owner defense before applying section 881(h). If the property is exempted from forfeiture pursuant to an innocent owner defense and therefore is not forfeitable property under subsection (a), then section 881(h) does not apply to such property that is not subject to forfeiture.

United States v. A Parcel of Land Known as 92 Buena Vista Ave., 937 F.2d 98, 102 (3rd Cir. 1991) (emphasis in original; footnote omitted).

Significantly, the Eleventh Circuit used similar reasoning in one of its leading cases interpreting the interaction of subsection (h) with subsection (a). In *United States v. One Single Family Residence With Out Buildings Located at 15621 S.W. 209th Ave.*, 894 F.2d 1511, 1516 (11th Cir. 1990), the Eleventh Circuit rejected the federal government's position that forfeiture pursuant to the relation back doctrine should occur before determination of the interest of the innocent owner.

The Eleventh Circuit reasoned:

> Reading subsection (h) of section 881 in tandem with subsection (a), it becomes clear that the "right, title, and interest" that vests in the United States upon commission of the unlawful act comprises only so much of the property as is "subject to forfeiture" under the appropriate

> division of subsection (a). The words of 881(a) . . . do not support the government's assertation that the innocent owner's interest amounts to whatever is left over after the government has effected the forfeiture.

894 F.2d at 1516. "Instead," the Eleventh Circuit concluded, "the government obtains through forfeiture whatever interest remains in the property after the innocent owner's interest has been excepted." *Id.*

Thus, the Third Circuit and the Eleventh Circuit independently reached the same conclusion in interpreting the interaction of the relation back doctrine of subsection (h) with the innocent owner provision of subsection (a). Both Circuit Courts rejected the interpretation that the federal government urges on this Court.

Curiously, the federal government has repeatedly and successfully argued that the relation back provisions of state forfeiture laws (virtually identical to the relation back provision of section 881), do *not* destroy the interest of one innocent owner – the tax lien of the IRS – even if the tax lien arose and attached *after* the date of the illegal act giving rise to the forfeiture. *See, e.g., United States v. Wingfield,* 822 F.2d 1466, 1475 (10th Cir. 1987), *cert. dismissed sub nom County of Boulder v. United States,* 486 U.S. 1019, 108 S.Ct. 1762 (1988); *State of Connecticut v. Bucchieri,* 407 A.2d 990, 995 (Conn. S.Ct. 1978). It is disingenuous for the federal government to now urge a different standard simply because in this case it is the government entity making the forfeiture, instead of the government entity seeking to protect its tax lien. Fairness, Comity, and Federalism require that the federal forfeiture statutes be interpreted in a manner similar to the interpretation of

state forfeiture statutes advanced by the federal government when it was an innocent owner trying to protect its interest that arose after the date of the illegal act.

(2) Section 881(a)(6) States That An Innocent Owner Can Obtain A Protectable Interest In "Proceeds" Of Drug Transactions.

The federal government's contention that an innocent owner's interest can *never* arise *after* the date of the criminal act on which the forfeiture is based, *see, e.g.,* U.S. Initial Brief at 5, 14, 25, 29, conflicts with another aspect of the civil forfeiture statute. Section 881(a)(6) of Title 21 specifically provides for an innocent owner exception from forfeiture for "proceeds traceable to . . . an exchange." This statutory language indicates that the interest of an innocent owner can arise after the illegal exchange. Otherwise there could never be an innocent owner of "proceeds" because proceeds do not occur until after the criminal act. As the concurring judge in *Nissan* explained:

> I reject the view that 21 U.S.C. section 881(h) forbids anyone from qualifying as an innocent owner if he or she acquired the money or property *after* the illegal transaction. Such an interpretation would seem impossible to square with the plain language of [the innocent owner provision of] section 881(a)(6) which expressly encompasses *"proceeds traceable to . . . an exchange"* of controlled substances.

"How," the judge demanded, "can one obtain drug deal proceeds before the transaction even takes place?" *Nissan,*

889 F.2d at 1322 (Murnaghan, J., Ervin, C. J., Phillips, J. concurring in en banc decision) (emphasis in original).

The legislative history supports the conclusion of the concurring judges in *Nissan*. The innocent owner language of section 88(a)(6) resulted from an amendment offered by, among others, Senator Nunn who explained that the intent of the innocent owner language was "to make it clear that a bona fide party who has no knowledge or consent to the property he owns having been derived from an illegal transaction, that party would be able to establish that fact under this amendment and forfeiture would not occur." Remarks of Senator Nunn, 124 Cong. Rec. S23057 (July 27, 1978), *cited in United States v. Property Known as 6109 Grubb Road*, 886 F.2d 618, 625 (3rd Cir. 1989).

In commenting on the innocent owner amendment, Senator Culver stated "that the original language could have been construed to reach properties traceable to the illegal proceeds but obtained by an innocent party without knowledge of the manner in which the proceeds were obtained. The original language is modified in the proposed amendment in order to protect the individual who obtains ownership of proceeds with no knowledge of the illegal transaction." Remarks of Senator Culver, 124 Cong.Rec. 23056 (July 27, 1978), *cited in 6109 Grubb Road*, 886 F.2d at 625.

Both Senator Nunn's and Senator Culver's comments establish that an innocent owner will be protected from forfeiture even if the property he owns was "derived from an illegal transaction" or was "traceable to illegal proceeds." For the federal government's position to be

correct, both of these Senators had to completely misunderstand the meaning of the amendment they were sponsoring.

After reviewing this legislative history, one judge concluded, "as 'proceeds' under section 881(a)(6) necessarily bear the imprimatur of a *prior* illegal transaction, Congress' enactment of the innocent exception to that section serves to underscore the ability of a subsequent transferee, under certain circumstances, to obtain innocent owner status." *United States v. One Single Residence at 2901 S.W. 118th Court, Miami, Florida*, 683 F. Supp. 783, 787 (S.D. Fla. 1988).

(3) Contrary To The Federal Government's Contention, The Term Innocent "Owner" Used In The Civil Forfeiture Statute Is Broader Than The Term "Bona Fide Purchaser" Used In The Criminal Forfeiture Statute.

Yet another fallacy of the federal government's reasoning is that it requires the Court to adopt an interpretation of the term "owner" as used in the civil forfeiture provision of section 881 that is narrower than the term "bona fide purchaser" used in the criminal forfeiture provision of section 853. This interpretation strains the common meaning of these words and leads to several absurd results.

In the criminal forfeiture statute, the only innocent parties protected from forfeiture are "bona fide purchasers." *See* 21 U.S.C. section 853. In the civil forfeiture statute at issue here, however, Congress omitted the limiting language and used the much broader term innocent

"owner," which includes not only bona fide purchasers but also other innocent parties who acquire a interest in property targeted for forfeiture after the date of the act giving rise to the forfeiture.

Congress clearly intended the civil forfeiture provision to offer more protection to innocent parties than the criminal forfeiture provision. As the Third Circuit reasoned:

> The Criminal Forfeiture Statute, section 853, is explicitly limited to bona fide purchasers for value, while in section 881 Congress omitted such limiting language. We believe that such a difference was intended by Congress. . . . In section 881, Congress chose to utilize the broad term "owner." Therefore, rather than reading into section 881 a requirement that an owner be a bona fide purchaser for value, we conclude that Congress intended to omit the bona fide purchaser for value requirement in that section.

Buena Vista, 937 F.2d at 102. The Court concluded, "we hold that [a party] need not be a bona fide purchaser for value to raise an innocent owner defense pursuant to 881(a)." *Id.*

This result is in accord with the remedial purpose of the innocent owner provision which is to protect innocent parties from forfeiture. The Eleventh Circuit stated, "The term 'owner' should be broadly interpreted to include any person with a recognizable legal or equitable interest in the property seized. Specifically the property would not be subject to forfeiture unless the owner of such property knew or consented to the fact that the property was used for or traceable to illegal drug activities."

United States v. One Single Family Residence With Out Buildings Located At 15621 S.W. 209th Ave., 894 F.2d 1511, 1514 (11th Cir. 1990). This is so because "[w]hen the forfeiture statutes are viewed in their entirety, it is manifest that they are intended to impose a penalty only upon those who are significantly involved in a criminal enterprise." *Id.* at 1516, *quoting United States v. United States Coin & Currency,* 401 U.S. 715, 721-22, 91 S.Ct. 1041, 1044-45 (1971).

This result is in accord with the principle that civil forfeiture should offer more protections to innocent parties than is necessary in criminal forfeiture, when the criminal defendant is a party and the purpose of the forfeiture is to punish that criminal defendant.

The Third Circuit's reasoning also avoids several absurdities that follow from the federal government's interpretation. In the first place, the federal government's interpretation requires the Court to assume that the term innocent "owner" is narrower than, and does not even encompass, "bona fide purchasers." But the term "bona fide purchaser" obviously represents a sub-class of the broader category "innocent owner:" "bona fide purchasers" are only one example of the many possible types of "innocent owners." The federal government's interpretation distorts the plain meanings of these words.

In addition, the federal government's interpretation cannot be reconciled with the many cases holding that the interest of a bona fide purchaser is protected from civil forfeiture. Three judges of the Fourth Circuit, concurring in an en banc decision, explained why the innocent

owner provision of civil forfeiture must extend at least as far as bona fide purchasers:

> Great injustice would result if no one who obtained property once the drug transaction had occurred could qualify for the innocent owner exception in section 881(a)(6). It seems manifestly unfair to penalize an innocent person who has provided something of value in exchange for property that, unbeknownst to him, had been used in or derived from drug trafficking. If a drug dealer should buy a car from a perfectly reputable auto dealership with proceeds from drug sales, apparently, under the majority's opinion, the government could use civil forfeiture to take away the money paid to the car dealer, even though the dealer was entirely unaware that he had sold the automobile to a drug dealer. I do not believe that Congress intended such a result. The most logical approach is to read sections 881(h) and 881(a)(6) as allowing, as an exception to retroactive forfeiture, *bona fide* purchasers *for value* to qualify as innocent owners exempt from civil forfeiture, even though the transaction postdates the drug transaction.

In the case of One 1985 Nissan, 300ZX, 889 F.2d 1317, 1322 (4th Cir 1989) (Murnaghan, J., Ervin, C.J., Phillips, J. concurring). The federal government's interpretation simply cannot be reconciled with the cases protecting bona fide purchasers.[3]

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[3] Other courts have already recognized this exception for bona fide purchasers. *See, e.g., United States v. One Single Family*

(Continued on following page)

Finally, because the federal government maintains that the innocent owner provision of the civil forfeiture laws does not even protect bona fide purchasers, U.S. Initial Brief at 32, its interpretation means that innocent owners have *more* protections under the criminal forfeiture provisions of section 853 than under the civil forfeiture provisions of section 881. Thus, a bona fide purchaser's interest in property would be protected from forfeiture in a criminal forfeiture action, but would still be subject to forfeiture in a separate civil forfeiture action. The federal government's interpretation has Congress protecting the bona fide purchaser's interest with one hand and grabbing that interest with the other hand. It is absurd to interpret the drug forfeiture statutes as being so much at cross-purposes with each other. This Court should not construe a statute to impute to Congress "a purpose to paralyze with one hand what it sought to promote with another." *American Paper Institute, Inc. v.*

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Residence, 731 F. Supp. 1563, 1569 (S.D. Fla. 1990) (recognizing innocent owner status of party who purchased after criminal act: "the government's position to the contrary is not supported by the legislative history."); *United States v. One Parcel of Real Estate Located on Fellows Tracts C, D, E, and F of Pine Island Estates*, 715 F. Supp. 360, 363 (S.D. Fla. 1989) (recognizing innocent owner status of persons who purchased property after criminal act and after federal government filed forfeiture action). *See, also, United States v. One 56-Foot Motor Yacht Named Tahuna*, 702 F.2d 1276 (9th Cir. 1983) (person who purchased after date of illegal act had standing to contest forfeiture). This approach has been applauded by the legal commentators. Comment, *Tempering the Relation-Back Doctrine: A More Reasonable Approach to Civil Forfeiture In Drug Cases*, 76 Vir.L.Rev. 165, 186 (1990).

American Electric Power Service Corp., 461 U.S. 402, 421 (1983).

As the Third Circuit properly held, "to interpret section 881(h) in the manner suggested by the government would essentially serve to emasculate the innocent owner defense provided for in section 881(a)(6). No one obtaining property after the occurrence of the drug transaction – including bona fide purchasers for value – would be eligible to offer an innocent owner defense on his behalf." *Buena Vista*, 937 F.2d 102.

(4) The Federal Government's Interpretation Conflicts With The Interpretation of The Innocent Owner Provision of Another Forfeiture Law.

In *Florida Dealers and Growers Bank v. United States*, 279 F.2d 673, 677 (5th Cir. 1960), the Fifth Circuit interpreted the relations back and innocent owner provisions of another federal forfeiture act. *Florida Dealers and Growers* held that, notwithstanding the relations back provision, an innocent owner's interest could arise after the act that forms the basis of the forfeiture. The Court reasoned,

> If illegal use automatically destroyed all subsequent rights to mitigation of forfeiture, as the Government contends, it would be useless in a forfeiture proceeding for a claimant to prove he had no knowledge or reason to believe that the car was being illegally used. Such a construction would render that portion of the statute meaningless. *It would go a long way toward defeating the purpose of the statute, for it would protect only those claimants who acquired their interest before the illegal use.* This would allow the government to wait at its own pleasure and, perhaps long after the illegal use, seize and libel a vehicle thereby depriving any number of subsequent good faith vendees, mortgagees, or assignees of conditional sales contracts of the opportunity to petition for remission of forfeiture. We cannot accept such an interpretation.

Id. (emphasis added). The Court concluded, "As we read it, *this language [protecting innocent owners] may include an interest acquired by an innocent person after illegal use.*" *Id.* (emphasis added). The same reasoning applies with equal force to section 881(a)(6). The purpose of 881(a)(6) would be defeated in large part if it protected only claimants who acquired their interest before the illegal act.

(5) Congress Intended That The Relation Back Doctrine Apply Only To "Certain" Subsequent Transfers – Voluntary Transfers Intended To Fraudulently Hide Assets – Not To "All" Subsequent Transfers.

The main premise of the federal government's argument is that the relation back doctrine was intended to void *all* subsequent transfers by the drug trafficker. Thus, for example, the federal government states that "the 1984 committee report expresses the view that *all* transfers of 'tainted' property by drug offenders were 'voidable' in civil forfeiture proceedings. . . . " U.S. Initial brief at 33, n.11 (emphasis added). But a review of the legislative history reveals the contrary. Congress intended only that "*certain*," not "all" subsequent transfers be voidable.

The Senate report to the 1984 amendment to the Drug Forfeiture Act, which created Section 881(h), states:

> Under this [relation back] theory, forfeiture relates back to the time of the acts which give rise to the forfeiture. The interest of the United States in the property is to vest at that time, and *is not necessarily* extinguished simply because the defendant subsequently transfers his interest to another. Absent application of this principle a defendant could attempt to avoid criminal forfeiture by transferring his property to another person prior to conviction.
>
> The purpose of this provision is to permit the voiding of *certain* pre-conviction transfers and so close a potential loophole in current law whereby the criminal forfeiture sanction could be avoided by transfers that were not "arms' length" transactions.

S. Rep., No. 98-225, 98th Cong., 2d Sess., *reprinted in* 1984 U.S. Code Cong. & Ad. News 3182, 3383-84. (emphasis added).[4]

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[4] The "relation back" doctrine was inserted into three different forfeiture statutes 18 U.S.C. §1963(c); 21 U.S.C. §853; and 21 U.S.C. §881(h) by the same Congressional Act, P.L. 98-973. When reviewing the "relation back" provision of 881(h), the Senate Report refers the reader back to its earlier discussion of the "relation back" doctrine contained in the same report S. Rep. No. 98-225, 98th Cong. 2d Sess., *reprinted in* 1984 U.S. Code Cong. & Ad. News at 3398. Thus, the above-cited text applies to all three statutory uses of the "relation back" doctrine.

This legislative history is critical to interpreting section 881(h). It makes clear that the legal fiction of "relation back" is intended to prevent the criminal defendant from fraudulently transferring his property to another person in an attempt to avoid a forfeiture. Contrary to the statement by the federal government, Congress did not intend the relation back doctrine to void "all" subsequent transfers. Instead, Congress intended the relation back doctrine to void only "certain" subsequent transfers – those subsequent transfers that were made voluntarily by the drug trafficker in order to fraudulently avoid forfeiture. When the legislative history states that the federal government's interest "is not necessarily extinguished" by a subsequent transfer, the language clearly implies that there will be circumstances in which a subsequent transfer does "extinguish" any interest that otherwise would be created by the relation back doctrine.

This interpretation is in full accord with the two purposes of the drug forfeiture laws. The first purpose of the Drug Forfeiture Act, 21 U.S.C. §881 *et seq.*, is to break the economic back of drug traffickers. The Act is premised on a finding by Congress "that the conviction of individual racketeers and drug dealers would be of only limited effectiveness if the economic power bases of criminal organizations or enterprises were left intact. . . . " S. Rep. no. 98-225, 98th Cong. 2d Sess. *reprinted in* 1984 U.S. Code Cong. & Adm. News 3374. Accordingly, the Drug Forfeiture Act was designed "to strip these offenders and organizations of their economic power." *Id. See also Caplin & Drysdale, Char. v. United States*, ___ U.S. ___, 109 S.Ct. 2646, 2654-55 (1989) (purpose is "to lessen the economic

power of organized crime and drug enterprises" and to strip criminals "of their undeserved economic power.") (citations omitted).

In addition, however, Congress expressed a clear intention that the goals of the act – to punish and economically weaken criminals – were to be accomplished without injuring innocent parties. As the Eleventh Circuit recently concluded, the legislative history reflects "two interrelated aims of Congress: to punish criminals while ensuring that innocent persons are not penalized for their unwitting association with wrongdoers." *15621 S.W. 209th Ave.*, 894 F.2d at 1513.

Limiting the relation back doctrine to voluntary transfers by the drug trafficker that are intended to fraudulently hide assets from forfeiture is in full accord with the legislative history and would accomplish both of these Congressional goals. In contrast, the federal government's interpretation is contrary to the stated Congressional purpose of protecting innocent parties from forfeiture.

(6) The Federal Government's Interpretation Would Render The Forfeiture Laws Unconstitutional Under The Calero-Toledo Standard.

This Court has already suggested that the federal government's interpretation – which would forfeit the interests of all innocent owners who acquired an interest after the date of the act giving rise to forfeiture would be unconstitutional. *In Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 689-90, 94 S.Ct. 2080, 2094-95, 40 L.Ed.2d 452 (1974), this Court stated,

> [I]t would be difficult to reject the constitutional claim of an owner whose property had been taken from him without his privity or consent . . . Similarly, the same might be said of an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property; for in that circumstance, it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive.

The federal government's reading of section 881 runs afoul of this standard because it categorically destroys the property interests of innocent owners who are subsequent transferees even if they were uninvolved and unaware of the criminal act. The import of this language is not limited to when an innocent party obtains an interest. Instead, the import is that the constitution proscribes the forfeiture of the property interest of a truly innocent party. Of course, the Fifth applies with equal force to federal takings of the property interests of state and local governments. *United States v. 50 Acres of Land*, 469 U.S. 24, 32 105 S.Ct. 451, 455, 83 L.Ed.2d 376 (1984).

Accordingly, this Court should reject the federal government's interpretation of section 881 in order "to avoid deciding difficult constitutional questions where the text fairly admits of a less problematic construction." *Public Citizen v. United States Department of Justice*, ___ U.S. ___, 109 S.Ct. 2558, 105 L.Ed.2d 377 (1989).

CONCLUSION

Contrary to the clear Congressional purpose to protect innocent owners, the federal government's interpretation would automatically and inevitably lead to the confiscation of the property of many truly blameless and innocent parties. In fact, the federal government's interpretation is at the heart of its current nationwide campaign to forfeit the real property tax liens of innocent state and local governments and schoolboards. However this Court should decide the dispute presented by the individual facts of this case, it is respectfully requested that this Court not adopt the broad and overreaching interpretation of the relation back doctrine urged by the federal government.

Respectfully submitted,
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By THOMAS W. LOGUE*
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Amici Curiae

June 1992

APPENDIX A

(SEAL)

U.S. Department of Justice
Office of Legal Counsel

Office of the
Deputy Assistant Attorney General

Washington, D.C. 20530

July 9, 1991

MEMORANDUM TO GEORGE J. TERWILLIGER, III
Associate Deputy Attorney General

Re: Liability of the United States for State and Local Taxes on Seized and Forfeited Property

This memorandum responds to your request for our opinion whether property seized by, and ultimately forfeited to, the federal government is subject to taxation by state and local authorities.[1] We conclude that principles of intergovernmental tax immunity, combined with long-standing rules governing forfeiture and the express language of modern forfeiture statutes, establish that property ultimately forfeited to the federal government is not subject to state and local taxes arising after the date of an offense that leads to the order of forfeiture.[2]

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[1] This memorandum confirms oral advice we provided earlier to Cary H. Copeland, Director, Executive Office of Asset Forfeiture.

[2] Currently, "[t]he [Justice] Department's position is that the doctrine of sovereign immunity precludes the payment of State and local taxes on property which has been seized for federal forfeiture." Memorandum Re: Forfeiture Policies to

(Continued on following page)

Property actually forfeited to the United States is immune from taxation by state and local authorities in the absence of express congressional authorization. This doctrine finds its classic expression in *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). As the Court has subsequently explained, under *M'Culloch* "a State cannot constitutionally levy a tax directly against the Government of the United States or its property without the consent of Congress." *United States v. City of Detroit*, 355 U.S. 466, 469 (1958). *See also Cotton Petroleum Corp. v. New Mexico*, 109 S.Ct. 1698, 1707 (1989) ("absent express congressional authorization, a state cannot tax the United States directly"); *United States v. Allegheny County*, 322 U.S. 174, 177 (1944) (the "possessions, institutions, and activities of the Federal Government itself in the absence of express congressional consent are not subject to any form of state taxation").[3] Once property is forfeited to the United States, an attempt by a state or local government

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(Continued from previous page)

United States Attorneys Offices, *et al.*, from Cary H. Copeland, Director, Executive Office for Asset Forfeiture, July 3, 1990, at 1. Under this policy, the "date of the seizure marks the imposition of sovereign immunity." *Id.* at 2. The Department, therefore, "will not pay State or local taxes incurred after the property is seized for forfeiture." *Id.*

[3] The federal government's tax immunity has been described as a function of the supremacy of federal law under Article VI of the Constitution, *M'Culloch*, 17 U.S. at 436 (describing tax immunity as "the unavoidable consequence of that supremacy which the constitution has declared"); *United States v. New Mexico*, 455 U.S. 720, 733 (1982), and as a function of sovereign immunity, *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110, 122 (1954).

to tax that property in the absence of consent by the Congress is plainly invalid under the longstanding doctrine of intergovernmental tax immunity.[4]

The process of forfeiture presents the question whether that immunity might attach before the date on which the forfeiture is perfected by entry of an order of forfeiture. We conclude that it does, by operation of the relation back doctrine, which is codified in the major federal forfeiture statutes. For example, the provisions of federal law relating to civil forfeiture of certain drug-related property were amended by the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837, 2051 (1984), to provide that "[a]ll right, title, and interest in property [subject to forfeiture] shall vest in the United States upon commission of the act giving rise to forfeiture under this section." 21 U.S.C. § 881(h). *See also* 18 U.S.C. § 1963(c) (same); 21 U.S.C. § 853(c) (same).[5]

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[4] If seized property is not ultimately forfeited to the federal government, the owner of the property would remain liable for state and local taxes.

[5] Some courts have held that the relation back doctrine, if not expressly set forth in the statute, is simply a rule of statutory construction that applies only to those statutes making forfeiture automatic rather than permissive. *See, e.g., United States v. Thirteen Thousand ($13,000) in United States Currency*, 733 F.2d 581, 584 (8th Cir. 1984); *United States v. Currency Totalling $48,318.08*, 609 F.2d 210 (5th Cir. 1980). *See generally* Note, *Tempering the Relation-Back Doctrine: A More Reasonable Approach to Civil Forfeiture in Drug Cases*, 76 Va. L. Rev. 165, 181-83 (1990). After the adoption of express relation back provisions in the major forfeiture statutes, these holdings would appear to be of limited practical significance.

Under this principle, which by 1890 was the "settled doctrine" of the Supreme Court with respect to forfeitures,

> whenever a statute enacts that upon the commission of a certain act specific property used in or connected with that act shall be forfeited, *the forfeiture takes effect immediately upon the commission of the act;* the right to the property then vests in the United States, although their title is not perfected until judicial condemnation; *the forfeiture constitutes a statutory transfer of the right to the United States at the time the offence is committed;* and the condemnation, when obtained, relates back to that time, and avoids all intermediate sales and alienations, even to purchasers in good faith.

United States v. Stowell, 133 U.S. 1, 16-17 (1890) (emphases added). *See also United States v. Grundy & Thornburgh*, 7 U.S. (3 Cranch) 337, 348-54 (1806); *Florida Dealers and Growers Bank v. United States*, 279 F.2d 673, 677 (5th Cir. 1960).

Under the relation back doctrine the United States' title to forfeited property, although not perfected until an order of forfeiture is entered, arises on the date of the offense giving rise to forfeiture. *Florida Dealers and Growers Bank*, 279 F.2d at 676 ("At th[e] moment [of the illegal act] the right to the property vests in the United States, and when forfeiture is sought, the condemnation when obtained relates back to that time . . . "); *United States v. One Single Family Residence*, 731 F.Supp. 1563, 1567 (S.D. Fla. 1990) ("A final judgment of forfeiture merely confirms the government's interest . . . "). Because the interest of the United States arises on the date of the

offense, the federal government's tax immunity mandates that no state and local tax obligations may attach to the property after that date absent congressional authorization.

We have identified no congressional authorization sufficient to permit payment of state and local tax obligations arising after title to the property vests in the United States. Authority to pay state and local taxes on federally-owned property requires "express congressional authorization" to waive tax immunity. *Cotton Petroleum Corp. v. New Mexico*, 109 S.Ct. at 1707. *See also Kern-Limerick, Inc. v. Scurlock*, 347 U.S. at 122 (court will not "subject the Government or its official agencies to state taxation without a clear congressional mandate").[6] None of the relevant statutory provisions contains such authorization.

Although the statutory forfeiture provisions do contain some exceptions, none of those exceptions contemplates payment of state and local taxes. The exceptions to the criminal forfeiture statutes for a "bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture," 18 U.S.C. § 1963(c), 21 U.S.C. § 853(c), provide no authority for payment of state and local taxes. These exceptions not only fail to contain an

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[6] An example of such an explicit authorization is 42 U.S.C. § 1490h ("All property . . . the title to which is acquired or held by the Secretary under this subchapter other than property used for administrative purposes shall be subject to taxation by a State, Commonwealth, territory, possession, district, and local political subdivisions in the same manner and to the same extent as other property is taxed").

express waiver of tax immunity, but also do not, in their general language, reach the asserted interest of taxing authorities in the property, for those authorities do not qualify as bona fide purchasers for value.

The civil forfeiture statute's somewhat broader exception for "innocent owners," 21 U.S.C. § 881(a)(6), as the Department has traditionally interpreted it, does not waive the government's tax immunity. It consistently has been the position of the United States that one cannot qualify as an innocent owner if the asserted ownership interest (broadly construed to include liens) arose after the date of the offense at issue.[7] Given this reading, which we have no occasion to question here, there is no statutory basis for permitting state and local tax liens arising after the date of the offense to qualify for payment under the exception.

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[7] *See, e.g, In Re One 1985 Nissan,* 889 F.2d 1317, 1320 (4th Cir. 1989); *United States v. One Single Family Residence,* 731 F.Supp. at 1568 ("The Government contends . . . that the innocent owner provision only applies to claimants who owned the property at the time of the offense, and not to those who acquired the property afterward"). Most courts that have considered this position have agreed that "[t]he innocent owner exception applies only to owners whose interest vests prior to the date of the illegal act that forms the basis for forfeiture." *Eggleston v. Colorado,* 873 F.2d 242, 248 (10th Cir. 1989), *cert. denied,* 110 S.Ct. 1112 (1990). *See, e.g., In Re One 1985 Nissan,* 889 F.2d at 1320; *United States v. One 1965 Cessna 320C Twin Engine Airplane,* 715 F.Supp. 808, 811 (E.D. Ky. 1989); *United States v. One Piece of Real Estate,* 571 F.Supp. 723, 725 (W.D. Tex. 1983). *Cf. One Single Family Residence,* 731 F.Supp. at 1567-69.

We also find no authorization for the payment of state or local taxes in either the Attorney General's authority under 28 U.S.C. § 524(c)(1)(D) to pay "valid liens" against forfeited property or his authority under 28 U.S.C. § 524(c)(1)(E) to grant remission or mitigation of forfeiture. Neither of these provisions contains the express congressional authorization necessary to pay state and local taxes on federal property. Nor do they describe a category of permissible actions that might arguably include payment of state and local tax claims. Although the lien provision may permit the Attorney General to recognize property interests – including tax liens – in forfeited property that existed prior to the date of the offense, it does not make valid otherwise invalid attempts by state and local taxing authorities to attach liens to property after title has vested in the federal government. In like fashion, the Attorney General's authority to grant remission of forfeiture is insufficient to permit payment of tax liens attaching after the relevant offense, for such relief can be granted only if the petitioner "has a valid, good faith interest in the seized property as owner or otherwise." 28 C.F.R. § 9.5(b)(1).[8]

Our conclusion is consistent with that of courts that have considered related questions. Most directly relevant is the Tenth Circuit's decision in *Eggleston v. Colorado, supra.* There, the court held that the State's tax claims were invalid because the asserted state tax liens did not exist until after the event giving rise to federal forfeiture.

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[8] Although the criteria governing mitigation are somewhat more general (*e.g.*, "to avoid extreme hardship"), 28 C.F.R. § 9.5(c), nothing in any relevant statute or in the regulations expressly refers to state and local tax claims.

Similarly, the court in *United States v. $5,644,540.00 in U.S. Currency*, 799 F.2d 1357, 1364 (9th Cir. 1986), upheld forfeiture of property against the claims of California tax authorities who were unaware of the property's existence until after the date of the offense leading to forfeiture.[9]

We conclude that the federal government's immunity from state and local taxes precludes payment of such taxes that arise after the date of an offense that gives rise to forfeiture. We have identified no authority that permits the Department to pay tax claims arising after that date.

Please let us know if we can be of further assistance.

/s/ John Harrison
John C. Harrison
Deputy Assistant
Attorney General
Office of Legal Counsel

cc: Cary H. Copeland
Director
Executive Office for Asset Forfeiture

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[9] *See also United States v. Trotter*, 912 F.2d 964, 966 n.2 (8th Cir. 1990) ("Since title vests 'in the United States,' other creditors, including state agencies, may not claim any part of the funds if the government successfully obtains forfeiture"). It should also be noted that, because tax immunity runs to the benefit of the States as against the United States, some federal courts have invalidated federal tax liens arising after the date of an offense leading to forfeiture to a State following the relation back doctrine. *Metropolitan Dade County v. United States*, 635 F.2d 512 (5th Cir. Unit B. Jan. 1981). *But see United States v. Wingfield*, 822 F.2d 1466, 1475 (10th Cir. 1987) ("the doctrine of relation back under state law cannot be held to subvert the constitutional power to lay and collect taxes").

APPENDIX B

U.S. Department of Justice

United States Attorney
Southern District of Florida

87-1146. LTR.dpg

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155 South Miami Avenue, Suite 700
Miami, Florida 33130

*653-5448

Thelma Adelman

October 23, 1991

Ms. Thelma Adelman
510 NE 199 Terrace
Miami, FL 33179

RE: United States v. Real Estate at 1942 N.W. 95th Street, Miami, FL.
Case No. 87-1146-Civ-Davis

Dear Ms. Adelman:

This will acknowledge receipt of the documents left at this office on October 15, 1991. Please be advised that this real property was purchased on June 20, 1983 by convicted drug dealer Isaac Hicks. On June 17, 1987 the United States commenced a forfeiture action against this property. On July 10, 1987 a public notice of action and arrest was published in the Miami Review which gave notice that any person claiming any interest in the property must appear no later than thirty days from the date of the publication and file a written verified claim. A review of this file, shows that no such claim was filed by you at such time or while this case was pending. On March 14, 1989, an Order On Trial and Final Judgment

was entered in this case in which the real property was forfeited to the United States.

Although the judgment of Forfeiture to the United States was entered in 1989, pursuant to the provisions of 21 U.S.C. §881(h), title in the property is vested in the United States as a matter of law and relates back to June 20, 1983 – the date in which it was purchased with illegal drug proceeds by Isaac Hicks. Since title vested in the United States in June of 1983 when it was purchased by Isaac Hicks with illegal drug proceeds, any attempts to impose state and local taxes upon said federal property after that period are invalid. Thus, there is no basis for you to go forward with a tax sale of this federally owned property as such taxes are not legally due and owing, and may not be legally imposed after June 1983.

Under these circumstances, it may be in your interest to redeem the tax certificates you have purchased and receive a refund from Metro Dade County. In any event, the document you filed with the United States District Clerk of Court on April 8, 1991, purporting to be a "claim" is a legal nullity. I trust this will fully respond to your inquiry.

Very truly yours,

DEXTER W. LEHTINEN
UNITED STATES ATTORNEY

/s/ Edward B. Gaines
EDWARD B. GAINES
ASSISTANT U.S. ATTORNEY
(305) 536-4796

(8)

No. 91-781

IN THE

Supreme Court of the United States

October Term, 1991

UNITED STATES OF AMERICA,

Petitioner,

v.

[illegible], APPURTENANCES AND
[illegible] AT 66 BUENA VISTA AVENUE,
[illegible], AND EDITH ANN GOODWIN,

Respondents.

[illegible] the United States Court of
[illegible]

[illegible]

JOHN J. GIBBONS III
General Counsel
Counsel of Record

MICHAEL F. CROTTY
Deputy General Counsel for Litigation

AMERICAN BANKERS ASSOCIATION
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 663-5026

Of Counsel:
JOHN J. BYRNE
Senior Federal Legislative Counsel
AMERICAN BANKERS ASSOCIATION

June 26, 1992

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTION PRESENTED

Whether the relation-back doctrine applies to property otherwise excepted from forfeiture pursuant to the innocent owner defense.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-781

UNITED STATES OF AMERICA,

Petitioner,

v.

A PARCEL OF LAND, BUILDINGS, APPURTENANCES AND IMPROVEMENTS KNOWN AS 92 BUENA VISTA AVENUE, RUMSON, NEW JERSEY, AND BETH ANN GOODWIN,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF THE AMICUS CURIAE AMERICAN BANKERS ASSOCIATION IN SUPPORT OF RESPONDENTS

The American Bankers Association hereby respectfully submits this brief as amicus curiae in support of the Respondents, with the consent of both the parties. The signed consents of each are filed together with this brief.

INTEREST OF THE AMICUS CURIAE

The American Bankers Association ("ABA") is the principal trade association of the commercial banking

industry in the United States, having as members both national and state-chartered banks, located in each of the fifty states and the District of Columbia. Member banks of the Association range from the smallest of community banks through regional, super-regional and money center banks. Collectively, our membership holds over ninety percent of the assets of all domestic commercial banks.

In the ordinary course of performing one of the core functions of the banking industry, lending money, commercial banks regularly acquire "interests" in property—mortgages on real property, liens on such things as automobiles and boats, and so forth—as collateral for loans made. In the event that such property ends up as the subject of a civil forfeiture, banks stand to lose their security interest in their collateral. Under the government's theory in this case, carried to its logical and inevitable conclusion, our member banks would have no opportunity to oppose such a forfeiture or otherwise protect their interests as a matter of right, but would be left instead to the mercy and discretion of the very same Executive Department that has vigorously pursued the civil forfeiture in the first place, operating under rules promulgated by that Executive Department (subject to change by that Executive Department), and applying whatever burden of proof standards seem suitable to that Executive Department.

The ABA respectfully submits this brief to urge the Court to uphold the decision of the United States Court of Appeals for the Third Circuit which rejected the government's theory. That decision concluded that there is an "innocent owner" defense (21 U.S.C. § 881(a)(6)) under the civil forfeiture laws, and that

the government must overcome it before the "relation-back" doctrine (21 U.S.C. § 881(h)) can be utilized.

This case deals with the government's attempt to enforce a civil forfeiture under 21 U.S.C. section 881(a)(6) of a house that was believed to have been purchased with money obtained from illegal drug transactions. The respondent asserts that she was ignorant of the source of funds used to purchase the house. The government claims that it is irrelevant whether that is so or not because there is no "innocent owner" defense[1] where the respondent obtained her interest in the property after the events occurred giving rise to the forfeiture of the purchase money. The government takes the position that the relation-back doctrine gives it entitlement to the property as of the date of the offense. This theory states that once property is tainted by an illegal act, all rights to the property vest in the government and any subsequent owners have claim to the title inferior to that of the government.[2]

Banks and other financial institutions have long supported the government's efforts to stem the flow of monies derived from illegal drug transactions. The criminal and civil forfeiture laws do serve a useful purpose in taking the profit out of drug dealing. How-

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[1] The innocent owner defense that is contained in 21 U.S.C. 881 (a)(6) and (a)(7) provides that property is exempt from forfeiture "to the extent of the interest of an owner by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner."

[2] The first use of the doctrine was in *United States v. Stowell* 133 U.S. 1 (1890).

ever, the government's assertion of sweeping authority to seize property is unparalleled and places legitimate businesses such as financial institutions in a position of having to prove their lack of knowledge or awareness concerning the underlying transactions. This shift of the burden of proof is extremely difficult but the government's position in this case goes far beyond making an innocent party prove its case. The government here is advocating the elimination of the innocent owner defense in certain circumstances. Financial institutions will be prevented from having their day in court to protect their property if the government succeeds.

If this decision is reversed, financial institutions will restrict the flow of credit or other banking transactions to individuals when there is even the slightest suspicion of illegal activity. Our nation's banks, who are in the front-line of establishing programs to "know your customer,"[3] will never be able to rely on their deterrence efforts again. As long as there exists even the remote possibility that an institution may lose the value of its loan or collateral on a piece of property because the government has traced the proceeds of a crime to another entity, the financial institution will have to substantially limit its business activities. This result will hamper both domestic and international commerce and is simply not justified.

The Association believes that the decision of the Third Circuit must be upheld and that the innocent owner defense must be made available even after the

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[3] *See*, Cliff E. Cook, *Complying with the Spirit of BSA: "Know Your Customer" Policies and Suspicious Transactions Reporting*, ABA BANK COMPLIANCE, Summer 1991, p. 7.

commission of the act leading to the forfeiture. We vehemently disagree with the government's assertion that retaining the innocent owner defense for recipients of "tainted property even if ignorant of the source [of the funds] would undercut the effectiveness of forfeitures."[4]

SUMMARY OF THE ARGUMENT

Commercial transactions in the United States depend on the informed belief of all parties to a transaction that individuals have the ability and right freely to transfer monies, property or goods. The banking industry has been particularly hard hit during the past few years from failures and losses due in part to loans secured by real estate that have fluctuated in value. In addition, the lack of certainty on the scope of liability under various laws (such as the environmental liability statutes)[5] has forced banks to withhold credit or somehow restrict the flow of funds to otherwise worthy customers. This obviously has had a negative effect on the economy.

If this decision is reversed, similar credit tightening will begin anew. No prudent lender can rest knowing that the potential exists that the property in a transaction may be seized and its value lost. America's banks are implementing strong procedures to identify

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[4] Petitioner's Brief at p. 13.

[5] For example, S. 543 passed the Senate in October, 1991 because of the need to clarify lender liability under the Superfund laws. (P.L. 96-510). The hearing record established that financial institutions face considerable liability for cleaning up environmental damage that was not caused by those entities and this was "exacerbating the credit crunch, particularly for small businesses." S. Report 102-167 at 190.

their customers to determine whether illegal activity has occurred. If any bank makes a good-faith determination that a customer is honest and a good credit risk, the government should not be able to come in and seize the collateral for a loan without allowing the use of the innocent owner defense. Fairness requires no less.

Another problem will continue to exist for lenders if the government prevails. Lenders who refuse to make loans collateralized by property for fear of a forfeiture run a risk of violating their duty to the customer. A lender's effort to investigate prospective borrowers could conflict with its efforts to comply with the anti-discrimination laws or could subject it to defamation claims.[6]

The Third Circuit was correct in its concern that if the relation-back theory preempts the innocent owner defense, innocent third parties would receive the brunt of the government's wrath and lose their means of staying in business. Our brief argues that by denying the use of the innocent owner defense in situations where illegally derived monies have been used to purchase real property, the effect on the economy will be enormous and contrary to the goals of the statute and of the government.

ARGUMENT

I. The Holding Of The Court Below Should Be Affirmed.

Elimination of the innocent owner defense is contrary to the stated goals of Congress and the government under the forfeiture laws. The United States' war on drugs and their profits demand drastic measures. The response to the ever changing face of drug trafficking has been to attack the monies and properties that are purchased and received from this heinous activity. The weapons of choice have been the seizure and forfeiture activity advanced in the 1980's through a series of legislative enactments by the U.S. Congress.[7]

The position taken by the government here runs counter to its stated goals of using forfeiture to take the profit out of drug trafficking. If the Third Circuit's decision is reversed, as advocated by the government, innocent third parties will be punished by eliminating the right to due process under 21 U.S.C. section 881. This was clearly not intended by Congress nor the government. In fact, the addition of the real property forfeiture provisions to section 881 was done to further deterrence.[8]

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[6] *See, Ricci v. Key Bancshares of Maine, Inc.*, 662 F. Supp. 1132 (D. Me. 1987) (Upholding of $15,000,000 punitive damage award against a bank for terminating a customer's line of credit based on an incorrect tip from the FBI.)

[7] According to a 1988 Administrative Report on drug abuse:

> The seizure and forfeiture of the assets of drug offenders and drug money launderers constitutes one of the finest tools U.S. law enforcement authorities have to combat the drug trade. Drug trafficking is a crime driven by the potential for illicit profit, and the forfeiture of assets sends a powerful message to drug criminals that crime does not pay. However, the use of seizure and forfeiture as a weapon in the war against drugs must be expanded.

The White House Conference for a Drug-Free America Final Report (June 1988), p. 56.

[8] *See, Narrowing the Scope of Civil Drug Forfeiture: Section 881, Substantial Connection and the Eighth Amendment*, 89 Mich. L. Rev. 165, 189 (1990). The article goes on to cite the 1988 Department of Justice Manual which states that "[t]herefore,

Deterrence is not furthered by a governmental policy that places all property transfers in jeopardy. Deterrence is not even furthered in this case where the property that is being claimed by the government is not in the hands of the individual who allegedly violated the law. In fact, the respondent has already forced Mr. Brenna to leave her house; he is a fugitive from justice who, if he were ever to return to take advantage of the particular "tainted" property here in issue, would risk arrest. How is the individual who violated the law deterred from further criminal activity by having the government take property in which he has no legal or real interest?[9]

The expansion of the relation-back doctrine will turn common commercial activity on its head. Even with

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even if the property is worth a little, its forfeiture may nonetheless serve legitimate and overriding law enforcement objectives by depriving the wrongdoer of its use and availability." (at 189). In the 1990 Annual Report of the Department of Justice Asset Forfeiture Program, the Department does not mention relation-back, but states only that, "Federal forfeiture law expressly provides protection to the 'innocent owner', a party with an interest in the property subject to forfeiture who can demonstrate that, as the law requires, he had no knowledge of the illegal activity giving rise to the forfeiture, did not consent to the activity, and/or took all reasonable steps to prevent the activity."

[9] To take the government's position to its logical extreme, there is nothing to prevent seizure of the funds paid by Ms. Goodwin to the previous owner of the property or commission on the sale received by the real estate agent. Or to "trace" the disposition of those funds even further, perhaps to a new residence purchased by the prior owners of 92 Buena Vista Avenue, to the prior owners of *that* residence, and so on ad infinitum. The "relation-back" doctrine necessarily clouds title in all those transactions without an "innocent owner" defense.

the most advanced and aggressive monitoring system by financial institutions, all loans made with property as collateral may be forfeited due to an action that took place months or even years before the forfeiture. The advances made by the government in detecting and sorting out complex economic crimes are no match for the test of time.

As has been pointed out before, the public policy goals advanced by the government in the civil forfeiture area (i.e. deterrence) are not at issue here. Instead, the government has made it clear what it is trying to achieve in asking for a reversal in the Third Circuit. The government unabashedly states that "[p]ermitting the 'innocent owner' exception to be invoked by recipients of tainted property, *even if ignorant of the source of their gifts*, would undercut the effectiveness of forfeitures."[10]

The government is calling for an end to a third party's ability to attempt to prove its innocence no matter what the cost. Under the forfeiture laws, the "potential for prosecutorial abuse is obvious."[11] The government contends for a construction of the law whereby third parties may be punished based not on the issue of guilt or innocence, but on "such fortuitous factors as when the criminal act occurred or what type of forfeiture action the government chose to pursue."[12] The government's brief is a thinly-veiled at-

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[10] Petitioner's Brief at 13 (emphasis added).

[11] Mich. L. Rev. at 190, supra n. 8.

[12] *See* Adams, *The Government's Forfeiture Power: An Unreasonable Threat to Bona Fide Lenders*, 4 LENDER LIABILITY NEWS 1 (June 12, 1991) p. 12. The author points out an example

tempt to eliminate the innocent owner defense completely. However, even members of government's army against drug trafficking recognize Congressional intent. Members of the Drug Enforcement Administration recently admitted that the results of asset forfeitures "have sometimes proven draconian, especially in cases where owners have no knowledge of the illegal use of their property [and] [a]s a result, Congress has enacted 'innocent owner' provisions to help counteract some of the inequities of the forfeiture process.[13]

II. The Government's Claim That There Are Other Similar Avenues For Innocent Third Parties To Protect Their Interest In Property Is Erroneous.

The government, anticipating the argument from the lending community on unfairness, states that "[t]he harshness of statutory forfeiture has traditionally been tempered through administrative procedures for remission and mitigation."[14] The government goes on to argue that these procedures will not deprive persons who wish to regain forfeited property the opportunity to prove their innocence but rather "would simply require those persons to avail themselves of procedures that are authorized under a different statutory section."[15] Experience with petitions for remission and mitigation shows it to be a poor substitute for persons wishing to have their day in court.

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of abuse toward lenders:

> Thus in the case where an innocent bank holds a mortgage on property that turns out to be forfeitable, because it once housed a securities boiler room and was used to facilitate wire fraud, the bank may protect its lien under the criminal money laundering forfeiture law but not under the civil law.

[13] Clark and Pomares, *Responding to Claims by Innocent Third Parties*, CIVIL REMEDIES IN DRUG ENFORCEMENT REPORT (October/November 1991) p. 6.

[14] Petitioner's Brief at 37.

First, the petition and remission procedures are a "false remedy" for the unfairness of certain civil forfeiture actions because decisions are generally not subject to judicial review. In addition, the extraordinary delay under the petition and remission procedures in the disposition of cases substantially reduces the value of property that has been seized. Many bankers have had bad experiences with this remedy and some have concluded that when a bank is a third-party lienholder, it would be better served by incurring the extra costs and expense involved by contesting the forfeiture of the seized party in the courts in lieu of filing petitions for remissions or mitigation.

Most importantly, the standards of proof are higher under these procedures then under the innocent owner defense.[16] A remission petition will also not allow a lender to recover his costs and attorney's fees whereas several courts have allowed the recovery of attorney's fees for the innocent owner defense.[17]

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[15] Petitioner's Brief at 41.

[16] The standards are those enunciated under *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974) that in addition to showing lack of knowledge or uninvolvement with the illegal activity, that the lender took all reasonable steps to prevent the illegal use of the property.

[17] *In re Metmor Financial, Inc.*, 819 F.2d 446 (4th Cir. 1987); *In re Real Property Titled in the Name of Shashin, Ltd.*, 680 F. Supp. 332 (D. Hawaii 1987).

The government also points to its recent policy for Expedited Forfeiture Settlement Policy for mortgage holders as another alternative for innocent third parties to get a return of property. While our association applauds and was involved in the negotiations surrounding the creation of this new policy, the fact is that the policy is not mandatory and is only used in situations where the government does *not* contest a lender's claim to the property. Therefore, the procedure is not a substitute for litigating one's innocence in court on a government forfeiture.

The government also argues that "Federal law enforcement authorities do not, as a matter of practice, pursue forfeiture of property in the hands of bona fide purchasers for value who would ordinarily be expected to lack notice of the government's prior claim."[18] What protection will be afforded an innocent lienholder if the government does pursue these properties and the innocent owner defense is eliminated?

III. The Government's Analysis Of Both Case Law And Congressional Intent Are Erroneous.

The government states that in construing early forfeiture statutes, this court has uniformly rejected the innocent owner argument.[19] In point of fact, Congress has long provided statutory protection for innocent owners and the courts have honored that protection. In *United States v. Stowell*, 133 U.S. 1, 15-16 (1890), the Supreme Court, in discussing section 3262 of the Revised Statutes, stated: "That section clearly indicates that the interest of an innocent mortgagee or

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[18] Petitioner's brief at 39.

[19] Petitioner's Brief at 15 citing *Calero-Toledo*, 416 U.S. at 683-684 (citing *The Palmyra*, 25 U.S. (12 Wheat) 1, 14-15 (1827)).

other person having a lien on the lot or tract of land on which the distillery was situated would not otherwise be included in a forfeiture for acts of the owner only." Also, even the seminal case on forfeiture that favored the government was not ready to eliminate an innocent owner defense:

> [i]t would be difficult to reject the constitutional claim of an owner whose property subjected to forfeiture had been taken from him without his privity or consent. . .Similarly, the same might be said of an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property; for in that circumstance, it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive.[20]

In other words, if an innocent owner defense did not exist by reason of a statute, one would have to be created. The Constitution demands it.

The government draws the analogy between the civil forfeiture provisions of 21 U.S.C. section 881 and the criminal forfeiture provisions of 21 U.S.C. section 853. Section 853 provides a defense for innocent "transferees." In this case, Ms. Goodwin is clearly a "transferee," and would, in a criminal forfeiture case, be entitled to assert that defense. By contrast, Section 881 does not mention transferees; it mentions "owners" instead. The government construes this to

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[20] *See Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. at 689-90.

mean persons who already owned property alleged to be subject to forfeiture prior to the time that property became involved in the transaction or events giving rise to forfeiture.[21] In this case, the government argues, Ms. Goodwin is not and never has been the "owner" of 92 Buena Vista Avenue because she did not acquire an ownership interest prior to the time of the the unlawful transactions charged against Mr. Brenna.

We point out that that construction is not necessarily dictated by the language of the statute itself, and, indeed, is contradicted by the language. Section 881(a)(6) makes subject to forfeiture "all moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter,[and] *all proceeds traceable to such an exchange.*" The statute goes on to provide that *none* of such property is subject to forfeiture in the case of an owner without knowledge or consent. Obviously, someone can "own" money or securities or other things of value prior to the use of such property by another in the commission of a crime. But equally obvious is the fact that one cannot "own" the *proceeds* of an illegal act prior to the commission of the illegal act. Prior to the commission of the act, the property would not constitute "proceeds". And yet, the statutory innocent owner defense *in section 881* extends to "proceeds" as well as to property that might be owned beforehand.

The broader construction of the term "owner," for which we contend, is amply supported by the legislative history as well. It is clear that Congress intended the protections of the innocent owner defense to extend to "transferees" in section 881 as well as to other kinds of "owners."

[21]Petitioner's Brief at 12.

The legislative history of this defense, first outlined in the Psychotropic Substances Act of 1978, makes clear that the innocent owner defense was created "in order to protect the individual who *obtains* ownership of proceeds [of criminal activity] with no knowledge of the illegal transaction."[22]

More importantly, Congress intended "to make it clear that a bona fide party who has no knowledge or consent to the property he owns having been derived from an illegal transaction, that party would be able to establish that fact under this amendment and forfeiture would not occur."[23]

CONCLUSION

The government's efforts in the war on drugs are to be commended. The use of federal and state forfeiture laws, when used to punish wrongdoers is a valuable tool of deterrence. However, the government's position in this case goes well beyond the stated goals of the forfeiture laws and will have a ripple effect on all commercial transactions in the United States for years to come. By cutting off the ability to prove one's innocence, no amount of due diligence or aggressive reporting of suspicious transactions will help our nation's institutions avoid the clearly unintended results of the civil forfeiture law

[22] 124 Cong. Rec. S23056 (daily ed. July 27, 1978) Remarks by Senator Culver (emphasis added).

[23] *Id.* at S23057 (remarks by Sen. Nunn).

as applied by the government; namely that all transactions are suspect and all may be lost to the government.

The analysis of section 881 by the Third Circuit is a careful, common-sense response to a complex statutory scheme. Fairness demands due process to protect one's interest in property and for these reasons, the American Bankers Association as amicus curiae urges this court to affirm the decision of the Third Circuit.

Respectfully submitted,

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